

No. 12114

United States
Court of Appeals
for the Ninth Circuit

MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation,
Appellant,
vs.

GRANGE OIL COMPANY OF LINN AND BENTON COUNTIES, a cooperative corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

JAN 26 1949

PAUL P. O'BRIEN, CLERK

No. 12114

United States
Court of Appeals
for the Ninth Circuit

MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation,
Appellant,

vs.

GRANGE OIL COMPANY OF LINN AND BENTON COUNTIES, a cooperative corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	8
Exhibit A—Amended Schedule Endorse- ment	18
Exhibit B—Standard Provisional Stock Form —Annual Settlement	19
Appeal:	
Certificate of Clerk to Transcript of Record on	73
Designation of Record on (DC).....	67
Designation of Record on (USCA).....	157
Motion for Order Dispensing with Printing of Exhibits on (USCA)	154
Notice of	64
Order Extending Time to Docket.....	69
Statement of Points on (DC).....	65
Statement of Points on (USCA).....	153
Certificate of Clerk to Transcript of Record on Appeal	73

ii.

	PAGE
Complaint	2
Decision, Memorandum of	50
Designation of Record on Appeal (DC).....	67
Designation of Record on Appeal (USCA)....	157
Docket Entries	70
Findings of Fact and Conclusions of Law.....	51
Judgment	63
Memorandum of Decision	50
Motion for Order Dispensing with Printing Exhibits	154
Names and Addresses of Attorneys.....	1
Notice of Appeal	64
Order Dispensing with Necessity of Printing Exhibits	156
Order Extending Time to Docket Appeal.....	69
Order, Pre-Trial	25
Order re Exhibits	70
Statement of Points on Appeal (DC).....	65
Statement of Points on Appeal (USCA).....	153
Stipulation re Exhibits	155
Transcript of Proceedings of Trial.....	74

Exhibits for Defendant:

18-19-20-21-22-27—Tabulation of Data Contained in the foregoing Exhibits—Reports of Actual Cash Values, May, 1946, through April, 1947	44
Admitted in Evidence	121-122
24—Provision Ledger Sheet Showing Posted Average Values for the Stock in Building No. 2 for the Policy Year.....	43
Admitted in Evidence	122
25—Copy of Letter Dated July 10, 1946, The Mills Mutuals to Monroe Feed Store....	48
Admitted in Evidence	122
26—Copy of Letter Nov. 24, 1946, The Mills Mutuals to Monroe Feed Store.....	49
Admitted in Evidence	122

Exhibits for Plaintiff:

2—Letter dated Aug. 20, 1946, from The Mills Mutuals to Grange Oil Company..	47
Admitted in Evidence	81

Witness for Defendant:

Sankela, Neil J.

—direct	122
—cross	138
—redirect	146

Transcript of Proceedings of Trial—(Cont'd)

Witesses for Plaintiff:

Gilder, Florence E.

—direct	111
—cross	118
—redirect	120

Jones, Vernon C.

—direct	82
—cross	102
—redirect	108, 111
—recross	109

Looney, M. J.

—direct	75
---------------	----

Weatherford, Mark V.

—direct	147
---------------	-----

NAMES AND ADDRESSES OF ATTORNEYS

GRIFFITH, PECK, PHILLIPS & NELSON, and
JAMES K. BUELL,

Room 807 Electric Building,
Portland, Oregon,
For Appellants.

HART, SPENCER, McCULLOCH &
ROCKWOOD,
HUGH L. BIGGS and
GEORGE H. FRASER,

Room 1410 Yeon Building,
Portland, Oregon;

WEATHERFORD & THOMPSON, and
MARK WEATHERFORD,

Albany, Oregon,
For Appellees.

In the Circuit Court of the State of Oregon
for the County of Benton
No. 13318
Civ. 4023

GRANGE OIL COMPANY OF LINN & BEN-
TON COUNTIES, a Co-operative Corporation,
Plaintiff,

vs.

MICHIGAN MILLERS MUTUAL FIRE IN-
SURANCE COMPANY, a Michigan Corpora-
tion,

Defendant.

COMPLAINT

Comes now the above-named plaintiff and for
cause of action against the above-named defendant,
complains and alleges:

I.

That at all times alleged herein, plaintiff was
and yet is a corporation organized and existing
under and pursuant to the co-operative laws of
the corporation laws of the State of Oregon.

II.

That at all times alleged herein, the defendant
was and yet is a corporation organized and exist-
ing under and pursuant to the laws of the State of
Michigan with its office and principal place of busi-
ness in the State of Michigan and licensed to trans-
act the general fire insurance business in the State
of Oregon and is organized for that purpose and
particularly for the purpose of writing and carry-
ing fire insurance upon mill stocks, grain, seeds,

and other merchandise and farm produce in the State of Oregon and has designated and appointed the Insurance Commissioner of the State of Oregon as its agent and attorney in fact for the acceptance of service of process all of which had been designated and is now designated under and pursuant to the laws of the State of Oregon; that defendant has no place of business established or at all in the State of Oregon.

That heretofore and on or about May 1, 1943, one Theodore Kowalski was operating a general feed and cleaning business in certain buildings within the city of Monroe, Benton County, State of Oregon, and was receiving, purchasing, and cleaning seeds and grain and at [1*] said time secured insurance policy No. 133021 issued by the defendant Michigan Millers Mutual Fire Insurance Company for a period of five years ending May 1, 1948; that thereafter and on May 1, 1944, the plaintiff herein purchased and acquired the said buildings and business of the said Theodore Kowalski and the said Kowalski assigned his interest in said insurance policy to the plaintiff and thereafter and on May 3, 1944, the defendant accepted said assignment and continued said insurance policy in force under the name of the plaintiff Grange Oil Company of Linn & Benton Counties, trading as Monroe Feed Store; that thereafter from time to time and by various endorsements placed thereon and for premiums paid and to be paid the said defendant com-

* Page numbering appearing at foot of page of original certified Transcript of Record.

pany insured and issued riders and parts of policy and scheduled endorsements attached to said original policy and insured all of the seeds, grain, and farm produce in the various buildings owned and operated by the plaintiff and on August 19, 1946, issued the endorsement insuring the said contents of building number one, Monroe, Benton County, Oregon, owned by the plaintiff, "frame, ironclad elevator and feed mill, known as Plant One," in the amount of \$120,000.00, and the said contents of building number two, at Monroe, Benton County, Oregon, "frame warehouse and seed cleaning plant known as Plant Two," in the amount of \$145,000.00, per cent of insurance under this policy in each instance 100%, limit of liability under this policy subject to any one fire \$145,000.00 for number two, and \$120,000.00 for number one, and various amounts for the contents of other buildings owned and operated by the plaintiff; that thereafter and during the summer, fall, and until the 9th day of January, 1947, seed, grain, and other farm products were stored in said building number two, known as Plant Number Two, in said endorsement and in addition to said insurance of \$145,000.00 on said contents, the plaintiff, with the consent of the defendant, secured additional insurance on the contents of said buildings, plant number two, as follows: In the Home Insurance Company, a sum of \$25,000.00, and \$8,333.00 in the Sun Insurance Company, a total of \$33,333.00 in additional insurance.

IV.

That thereafter the plaintiff had in said building

number two and covered by all three of said policies farm produce consisting of seeds, grain and kindred items of the sound value of \$121,410.31, all of which merchandise, seeds, and grains were in said building number two on January 9, 1947, at and when the same was burned and destroyed [2] by fire, save a salvage received therefrom in the amount of \$753.89, leaving a total loss of \$120,656.42; that the said insurance policy thus issued by the defendant herein stipulated and provided for the consideration of the premiums paid and to be paid to repay the plaintiff for the said loss of said property by fire; that heretofore the plaintiff made proof of loss which was accepted by the defendant and a true adjustment was made of said loss and of the value of the property destroyed as designated and described in the said insurance policy and it was agreed between plaintiff and the defendant that the total loss was the sum of \$120,656.42 and said accounting and adjustment was accepted by both plaintiff and the defendant and the two additional insurance companies; that thereafter the Home Insurance Company paid the full face value of its insurance policy in the sum of \$25,000.00 and the Sun Company paid the full amount of its policy in the sum of \$8,333.00, a total of \$33,333.00; that said sum deducted from the total loss of \$120,656.42, leaves a balance of the loss suffered in the sum of \$87,323.42.

V.

That thereupon the plaintiff made claim to the defendant herein for the payment of said sum of

\$87,323.42, the defendant's share of said loss as covered by said insurance policy; that the defendant paid the sum of \$70,760.07; that said payment was made through an agreement between plaintiff and defendant wherein and whereby the rights of plaintiff were in nowise to be jeopardized for the additional \$16,563.35 claimed to be due from the defendant to the plaintiff.

VI.

That said policy provided that the plaintiff would with other insurance keep the whole of said stock of grains, seeds, and insured items insured to 100% of its value; that plaintiff did keep said additional insurance and at all times kept and maintained sufficient additional insurance, together with the insurance carried with the defendant, to fully cover all of said merchandise, seeds and grains kept and stored within said building and did pay all premiums requested for said insurance and tendered any and all additional premiums that may be due for the insurance carried by plaintiff and has fully performed all and singular the insurance contract by it to be performed and has paid all insurance premiums that the defendant has exacted and has tendered [3] additional premiums, which amount is unknown to plaintiff but which may be found due in this court as due from the plaintiff to the defendant, and does hereby tender any additional premiums that may be found due from plaintiff to defendant; that each party has agreed that the amount, if any, still remaining due plaintiff shall

be determined in the courts and have waived any and all provisions for arbitration, if any prevail, in said policy of insurance or in the laws of the State of Oregon; that the sum of \$16,563.35 became due under the terms of said policy from the defendant to plaintiff upon the determination and adjustment and agreement as to the amount of said loss by said fire of January 9, 1947, and plaintiff made demand at said time to defendant on and prior to May 29, 1947, for the payment of the said balance due; that the plaintiff has performed all and singular the obligations of said contract by it to be performed.

VII.

That more than six months have elapsed since the adjustment of said loss and the refusal of the defendant to pay the balance due from the defendant to the plaintiff in the sum of \$16,563.35; that it has been and is necessary for plaintiff to employ counsel for the prosecution of this action and the collection of said sum; that the sum of \$1,500.00 is a reasonable sum to be allowed the plaintiff as attorneys' fees in this action.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$16,563.35, with interest thereon at the rate of six per cent per annum from May 29, 1947, and for plaintiff's costs and disbursements herein, and the further sum of \$1,500.00 attorneys' fees.

WEATHERFORD & THOMPSON,

Attorneys for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Dec. 23, 1947. [4]

In the District Court of the United States
for the District of Oregon

No. Civ. 4023

GRANGE OIL COMPANY OF LINN & BEN-
TON COUNTIES, a Co-operative Corporation,
Plaintiff,

vs.

MICHIGAN MILLERS MUTUAL FIRE IN-
SURANCE COMPANY, a Michigan Corpora-
tion,

Defendant.

ANSWER

Comes now defendant and for its Answer to
plaintiff's complaint, admits, denies and alleges as
follows:

I.

Admits the allegations contained in Paragraphs
I and II of plaintiff's complaint.

II.

Answering Paragraph III, defendant admits that
it had issued a provisional policy of fire insurance
No. 133021 to Theodore Kolwalski, and that on
May 1, 1944, defendant consented to the assign-
ment of said policy to plaintiff, and defendant af-
fixed its endorsement No. 4, making plaintiff the
named insured under said policy.

III.

Answering Paragraph IV, defendant admits that on January 9, 1947, a fire destroyed a warehouse described in said Paragraph as Building No. 2 and caused damage in the total amount of \$120,656.42, and that for said damage plaintiff has heretofore been indemnified by the Home Insurance Company, a corporation, and the Sun Insurance Company, a corporation, in an amount approximating \$33,333.00.

IV.

Answering Paragraph V, defendant alleges that it has paid plaintiff pursuant to said policy No. 133021, the sum of \$70,966.89 and alleges that such payment constitutes full and complete payment of all sums that became due to plaintiff pursuant to said policy. [18]

V.

Alleges that the payment of said sum of \$70,966.89 was made pursuant to an agreement in writing executed by plaintiff; that such payment was made and accepted without prejudice to the above cause of action by plaintiff and without prejudice to any defenses of defendant thereto.

VI.

Denies each and every allegation as set forth in plaintiff's complaint excepting such allegations as hereinbefore admitted and excepting such allegations as may be specifically admitted, stated,

or qualified in defendant's further and separate and affirmative answers and defenses, which said affirmative answers are made a part hereof for the purpose of this denial, the same as though fully set forth.

FIRST AFFIRMATIVE ANSWER AND DEFENSE

Comes now defendant and for its first separate and affirmative answer and defense to plaintiff's complaint alleges:

I.

That by an endorsement dated May 1st, 1944, defendant made plaintiff the named insured under its standard provisional stock fire insurance policy No. 133021 theretofore issued by defendant to Theodore Kowalski, and in consideration of the provisions and stipulations contained in said policy and of the payment of certain premiums then due and to become due, defendant agreed to insure plaintiff against all direct loss as determined and limited by the policy by fire to the property described in the schedule endorsements on said policy, and subject to all the provisions and stipulations contained in or added to said policy.

II.

That by amended schedule endorsement No. 10, dated August 19, 1946, the warehouse described in plaintiff's complaint as Building No. 2 was insured under and subject to the terms of said policy

and that a true copy of the said amended schedule endorsement, insofar as it pertains to said Building No. 2, is attached hereto, marked Exhibit "A," and made a part hereof for the purpose of this defense, the same as though fully set forth. [19]

III.

That said policy No. 133021 was made subject to the terms, provisions and stipulations contained in the standard provisional stock form, which said form was attached to and made a part of said policy on May 1, 1943, the date the said policy was issued, and that Paragraphs 1 through 15 of said standard provisional stock form are set forth in full in Exhibit "B," annexed hereto, and made a part hereof for the purpose of this defense, the same as though fully set forth.

IV.

That on January 9, 1947, said Building No. 2 was destroyed by fire and caused damage in a total amount of \$120,656.42.

V.

That in paragraph 3 of said standard provisional stock form, plaintiff promised and warranted to file with defendant at the end of each month, a true statement of the amount of non-provisional fire insurance in effect on said Building No. 2.

VI.

That on September 18, 1946, plaintiff reported in

writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of August, 1946.

That on October 11, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of September, 1946.

That on November 1, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of October, 1946.

That on December 13th, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of November.

That the report of December 13, 1946, was the last report of values and non-provisional stock insurance filed with the defendant prior to the loss on said Building No. 2 on January 9, 1947.

VII.

That on January 9, 1947, and during the months of August, September, October and November, 1946, there was, in fact, the sum of \$33,333.00 of non-provisional fire insurance on the stock in said [20] Building No. 2 in effect.

VIII.

That the reports of plaintiff alleged in Paragraph VI, *supra*, were the basis of computing the earned premium of defendant and of ascertaining the

amount of insurance in effect on said Building No. 2 during said period, and that the premium earned by defendant on the basis of plaintiff's report was less than the premium which defendant would have earned if a true report of the amount of non-provisional fire insurance on said Building No. 2 had been made.

IX.

That the above breach of warranty and non-fulfilment of plaintiff's promise to render a true report of the amount of non-provisional fire insurance was material to the risk of defendant under said policy and that defendant would not have underwritten the coverage on said Building No. 2 claimed by plaintiff, at the premium earned on the basis of plaintiff's report.

SECOND AFFIRMATIVE ANSWER AND DEFENSE

Comes now the defendant and for its second separate and affirmative answer and defense, alleges:

I.

Realleges the allegations contained in Paragraphs I, II, III and IV of defendant's first separate and affirmative answer and defense, and incorporates the same herein by reference the same as though fully set forth.

II.

That on September 18, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true

statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of August, 1946.

That on October 11, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of September, 1946.

That on November 1st, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of October, 1946.

That on December 13th, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional [21] fire insurance" on Warehouse No. 2 for the month of November.

That the report of December 13, 1946, was the last report of values and non-provisional stock insurance filed with the defendant prior to the loss on said Building No. 2 on January 9, 1947.

III.

That each of said reports was false and that on January 9, 1947, and during the months of August, September, October and November, 1946, there was, in fact, the sum of \$33,333.00 of non-provisional fire insurance on the stock in said Building No. 2 in effect.

IV.

That at the time it made the above reports, plaintiff knew that they were false and knew that defendant used the reports as a basis for computing its earned premium under said policy and intended that defendant rely on said reports.

V.

That defendant, in fact, relied upon said reports and computed its earned premiums on the basis thereof.

VI.

As a direct result of the falsity of said reports, defendant was damaged in that it earned a lesser premium for the period of time covered by said reports than it would have if a true report of the non-provisional stock insurance on Building No. 2 had been made.

VII.

That plaintiff is thereby estopped to claim that it had any other amount of non-provisional fire insurance on said Building No. 2 than the sum of \$50,000.00.

THIRD AFFIRMATIVE ANSWER AND
DEFENSE

Comes now the defendant and for its third separate and affirmative answer and defense, alleges:

I.

Realleges the allegations contained in Paragraphs I, II, III, IV, VI and VII of defendant's first separate and affirmative answer and defense, and incorporates the same herein by reference the same as though fully set forth. [22]

II.

That on January 9, 1947, at the time of the fire loss in said Building No. 2, the actual cash value

of the stock located in said building was the sum of \$121,410.31.

III.

That pursuant to Paragraph 5 of said standard provisional stock form, annexed hereto as Exhibit "A," the amount of provisional insurance under said policy in effect on January 9, 1947, was the sum of \$71,410.31.

IV.

That the total amount of insurance in effect on said Building No. 2 was the sum of \$104,743.31.

V.

That said stock in Building No. 2 was under-insured in the amount of \$16,667.00.

VI.

That pursuant to Paragraph 7 of said standard provisional stock form annexed hereto as Exhibit "B," defendant was obligated to pay such percentage of the total loss of the property insured as the amount of provisional insurance defendant had in effect at the time of the loss bore to the total value of the insured property, and that pursuant to said Paragraph 7, defendant was obligated to indemnify plaintiff for the sum of \$70,966.89, which sum has been paid to the plaintiff.

FOURTH AFFIRMATIVE ANSWER AND
DEFENSE

Comes now the defendant and for its fourth separate and affirmative answer and defense, alleges:

I.

Realleges the allegations contained in Paragraphs I, II, III, IV, VI and VII of defendant's first separate and affirmative answer and defense, and incorporates the same herein by reference the same as though fully set forth.

II.

That plaintiff failed to correct said reports prior to the time of said loss, and by the terms of Paragraph 8 of said standard provisional stock form, annexed hereto as Exhibit "B," is precluded from making such correction or change after the time of said loss. [23]

III.

That pursuant to Paragraph 9 of said standard provisional stock form, annexed hereto as Exhibit "B," at the time of loss a premium for the insurance in effect on the stock in said Building No. 2 for the unexpired portion of the year became due and payable on the basis of the amount of the loss under the policy, and for the expired portion of the year on the basis of the reports rendered to defendant.

IV.

That said earned premium was computed on the basis of said reports and said amount of loss paid under the policy, and was paid by plaintiff, and amounted to the sum of \$1,260.88 for the period from August 19th, 1946, to May 1st, 1947.

V.

That defendant was precluded from charging a premium on the basis of the deficit in the amount of non-provisional stock insurance reported by the terms of Paragraphs 7 and 8 of said standard provisional stock form annexed hereto as Exhibit "B."

VI.

That defendant has, therefore, received no premium and no consideration for insuring the portion of said loss for which plaintiff asks recovery in this action.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by its complaint and that defendant recover judgment from the plaintiff for its costs and disbursements herein.

GRIFFITH, PECK, PHILLIPS
& NELSON,

By /s/ JAMES K. BUELL,

Attorneys for Defendants.

EXHIBIT "A"

AMENDED SCHEDULE ENDORSEMENT

This Schedule Endorsement is a part of the Standard Provisional form attached to the policy described at the foot of this Endorsement.

Item No. 2. Location: Monroc, Oregon. Rate: 1.91. Description: Frame Warehouse and Seed Cleaning Plant, known as Plant No. 2. Limit of Insurance Subject to Any One Fire: \$145,000. Percent of Ins. under this Policy: 100%. Limit of Liability under this Policy Subject to any One Fire: \$145,000.

Attached to and made part of Policy No. 133021 of the Michigan Millers Mutual Fire Insurance Company, Lansing, Michigan.

Issued to Grange Oil Company of Linn & Benton Counties trading as: Monroe Feed Store, Monroe, Oregon.

Dated August 19, 1946 (EC).

B. L. HEFLER,
Agent.

Endorsement No. 10

EXHIBIT "B"

STANDARD PROVISIONAL STOCK FORM
ANNUAL SETTLEMENT

Selling Price Basis

1. On stock consisting of grain and seeds, stock in process, finished stock and all other merchandise and supplies, not otherwise insured and not more hazardous, handled or used by the insured in their business, their own, or held by them in trust, or on storage if in case of loss the insured is legally liable therefor; all while contained in the building or buildings as located and described in the "schedule Endorsement" attached hereto, or while in or on cars or trucks within 100 feet of said buildings, except when carrier is liable.

2. It is understood that any specific amount of insurance named in this policy, or in certificates issued hereunder, and the first and subsequent annual premiums to be paid therefor are only provisional; and that the amount of insurance here-

under at any time on the stock described in Paragraph 1 shall be determined by the procedure outlined in Paragraph 5.

3. The insured expressly agrees to file with this insurer, or its designated agent, after the close of the insured's business upon the last Saturday of each month, and before a loss shall have occurred, a true statement in writing of the value (as defined in Paragraph 4) of the stock covered hereunder at each location described in the "Schedule Endorsement," as of the close of business on each Saturday [25] of such month; and, if the insured so elect, such an amount in addition thereto as the insured shall estimate as sufficient to cover errors or omissions in ascertaining such value; and the insured shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder.

4. It is agreed that wherever the term "Stock" is used in this form it shall be held to include all property covered hereunder as described in Paragraph 1 hereof. It is further agreed that wherever the term "Value" is used in this form it shall apply in the manner set forth in section (4a), (4b) and (4c) below at the location and at the time when such ascertainment of value is required by the conditions of this policy:

(4a) The value of stock, other than that manufactured by the insured, held for local or retail sale or for manufacturing purposes shall be the cost of replacing such stock;

(4b) The value of stock, other than that manu-

factured by the insured, held for shipment shall be the established cash shipping value of stock of like grade and quality.

(4c) The value of stock manufactured by the insured shall be the average carlot selling price.

5. The amount of Insurance under this form, at any time, at any location described in the "Schedule Endorsement," shall be determined by following the formula set forth in Sections 5A, 5B, 5C and 5D.

Section 5A. As of the time at which insurance in force is to be determined, ascertain the value, as defined in Paragraph 4, in such location.

Section 5B. Deduct from this value the amount of any non-provisional insurance against the hazards covered hereunder on said stock.

Section 5C. If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3 shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated amount, if any) and the average of actual values as ascertained for the same Saturdays.

Section 5D 1. If the amount determined by Sections 5A, 5B and 5C is less than the "Limit of Insurance" named in the "Schedule Endorsement," at such location, the amount thus deter-

mined shall be the "Amount of Insurance under this form."

2. If the amount determined by Sections 5A, 5B and 5C is equal to or greater than the "Limit of Insurance" named in the "Schedule Endorsement" at such location, the amount of the "Limit of Insurance" so named shall be the "Amount of Insurance under this form."

6. It is understood, however, that the amount of insurance under all policies covering under this form at each location shall not exceed the sum set opposite such location under the heading "Limit of Insurance"; and that the proportion of such insurance covered under this policy shall be the percentage of such insurance set opposite such location under the heading "Percentage of Insurance Under This Policy"; and in no event shall such proportion exceed the sum set opposite such location under the heading "Limit of Liability Under This Policy."

7. The premium earned under this policy shall be determined and an adjustment thereof made on each anniversary date hereof, or upon termination or cancellation of this policy based on the average of values filed with this insurer, or its designated agent, as required in Paragraph 3; but no premium shall be charged on any values in excess of the amount named as the "Limit of Liability Under This Policy," nor on any value protected by non-provisional insurance against the [26] hazards covered hereunder reported in accordance with Paragraph 3.

8. It shall be the privilege of the insured to make any changes desired by him in the last previously filed statement required in Paragraph 3 but such changes shall not be effective unless made in writing and filed with this insurer or its designated agent before a loss shall have occurred.

9. It is agreed that in the event of a loss a premium for the unexpired portion of the policy year based upon the amount of loss paid hereunder shall at once be due and payable.

10. Subject to all the terms and conditions of this policy, loss, if any, to be adjusted with the insured named herein and payable to the insured or order endorsed hereon for purposes of collateral security; but this insurance is void as to any subsequent owners or purchasers of the stock described herein.

11. This insurance shall not inure in any event to the benefit of any carrier.

12. This insurance does not cover storage or elevator charges.

13. The liability of this company for any or all of the hazards covered under this policy shall not exceed the amount stated in this policy and shall be subject to all of the terms and conditions specified herein.

14. Co-Insurance Clause: In consideration of the acceptance by the insured of the following Co-insurance Clause a reduction from the established premium rate of \$..... to \$..... has been allowed on this insurance:

In consideration of the rate and/or form under which this policy is written it is expressly stipulated and made a condition of this contract that the insured shall at all times maintain contributing insurance on each item of property insured by this policy to the extent of at least 100% of the actual cash value at the time of the loss, and that failing to do so, the insured shall to the extent of such deficit bear his, her or their proportion of any loss.

15. If this policy be divided into two or more items as shown by the Schedule Endorsement attached hereto, all the foregoing conditions and limitations shall apply to each item separately.

16.

17.

18.

19.

20.

21.

Attached to and made part of policy No. 133021 of the Michigan Millers Mutual Fire Insurance Company, Lansing, Michigan.

B. L. HEFLER,
Agent.

Dated May 1, 1943 (GT)

Selling Price Basis Form No. 156 M. M. F. P. B.
4-41.

(Affidavit of Service by Mail attached.)

(Duly Verified.)

[Endorsed]: Filed Feb. 13, 1948. [27]

[Title of District Court and Cause.]

PRETRIAL ORDER

A pretrial conference in the above-entitled action was held between the parties and counsel under the direction of the Court.

STATEMENT OF CASE

This is an action brought by the Grange Oil Company of Linn and Benton Counties, a co-operative corporation, against Michigan Millers Mutual Fire Insurance Company, a corporation, on a provisional stock fire insurance policy issued by defendant to plaintiff, insuring grain and other commodities stored in certain warehouses specified in the policy, to recover the sum of \$16,356.20, the balance which plaintiff claims over and above the sum of \$70,966.89, the amount which has been paid by defendant to plaintiff on a fire loss which occurred at one of the buildings covered by the policy on January 9, 1947.

The dispute is as to the amount of provisional insurance in effect under subject policy at the time of the loss and resulted from the fact that plaintiff inadvertently made false reports to defendant concerning the amount of specific insurance in effect and carried in other companies on the stock in the building in which the loss occurred.

The plaintiff claims that the errors in the reports to plaintiff given pursuant to the terms of the policy were inadvertent, and claims to have the right to correct the reports and pay the additional

premium which it would owe and thereby claims coverage as to the disputed portion of the loss

The defendant admits that the false reports made by plaintiff were not intentional and contends that the plaintiff is precluded by the terms of the policy from making any changes in the reports after a loss, and that according to the formula contained in the policy for computing the amount of provisional insurance in effect, and the defendant's share of the loss, plaintiff's claim under the policy has been paid. [30]

ADMITTED FACTS

I.

It is admitted that plaintiff is a co-operative corporation organized under the laws of the State of Oregon; that defendant is a corporation organized under the laws of the State of Michigan; that there is diversity of citizenship between plaintiff and defendant; that the amount in controversy in the above action, exclusive of interest and costs, is in excess of the sum of \$3,000.00; and that the Court has jurisdiction of the action.

II.

It is admitted that on January 9, 1947, plaintiff was the named insured under a provisional stock fire insurance policy No. 133021 issued by defendant, and previously assigned to plaintiff; that on said date said policy was in full force and effect; that under said policy the stock in a certain grain warehouse situated in Monroe, Oregon, and de-

scribed in the policy and referred to herein as Building No. 2, was insured; and that on said date a fire occurred in said building, resulting in a loss under the policy.

III.

It is admitted that the figures tabulated below represent the true values and amounts for the designated items as of January 9, 1947:

Limit of liability under policy on contents of Building	
No. 2	\$145,000.00
Actual value of contents of Building	
No. 2	\$121,410.31
Salvage value of contents	753.89
	<hr/>
	\$120,656.42
Actual amount of specific insurance carried in other	
companies	\$ 33,333.33

IV.

It is admitted that the report of actual cash values made to defendant pursuant to the policy for the month of November, 1946, was the last report received by the Company prior to the loss, and that the figures tabulated below represent the true values and amounts for the designated items for the month of November, 1946:

Average actual values as determined by plaintiff's report	
of actual cash values for the month of November.....	\$153,593.49
Actual amount of specific insurance carried in other	
companies	\$ 33,333.33
Report amount of specific insurance carried in other	
companies for the month of November.....	\$ 50,000.00

V.

It is admitted that the sum of \$70,966.89 has been paid by defendant to plaintiff and that said pay-

ment was made by defendant and accepted by plaintiff, without prejudice to the contention of either with respect to the construction of the policy and that plaintiff has performed all the conditions under the policy respecting notice and proof of loss.

VI.

It is admitted that plaintiff in its reports of actual cash values for the months of August, September, October and November of 1946 stated that there was \$50,000.00 of specific or non-provisional insurance on Building No. 2 and that, in fact, during the period of time which said reports covered, there was actually in effect \$33,333.33 of such insurance; that the errors in said reports were not intentional; that none of such reports were corrected prior to the loss; that defendant had no knowledge of the actual amount of specific insurance in effect; and, that no notice of the error in the reports was given the defendant prior to the loss; and, that the error did not come to the personal attention of the Manager of plaintiff's warehouse until after the loss.

ISSUES

Plaintiff's Contention:

I.

Plaintiff contends and defendant denies that defendant is liable to the plaintiff for the full sum of \$16,356.20, being the difference between the amount of the net loss and the sum of the amount heretofore paid plaintiff by defendant without prej-

udice and the specific insurance actually in effect at the time of the loss.

II.

Plaintiff contends and the defendant denies that the mistake made in good faith by plaintiff in reporting to defendant the actual specific insurance in effect at the time of the loss was without prejudice to any rights of the [32] defendant in that the error would have been discovered at the end of the premium year, if not sooner, by plaintiff in its annual audit of its records, and would then have been communicated to defendant or by defendant itself pursuant to its right to audit the plaintiff's records in computing the final premium due it for the preceding year's insurance coverage. The loss occurred before the error had been discovered and some four months prior to the anniversary date of the policy.

III.

Plaintiff contends and defendant denies that upon discovery of the error plaintiff would have paid defendant such additional premiums as an accurate report of the specific insurance would have entitled defendant to.

IV.

Plaintiff further contends and defendant denies that even if plaintiff had failed to pay the additional premiums, if any, due defendant, defendant's only remedy against plaintiff would have been for breach of contract to recover as damages the

difference between the premium actually collected from plaintiff and the premium due defendant on the basis of accurately reported specific insurance.

V.

Plaintiff contends and defendant denies that defendant immediately upon discovery of the error in reporting the specific insurance became entitled to additional premiums as a result thereof, and that plaintiff upon discovery of such error made timely tender of such additional premiums as were due defendant, which tender defendant rejected, and the plaintiff in its complaint filed herein in writing tendered, and here renews its tender of, such additional premium as the court may determine is due the defendant on the basis of the specific insurance actually in effect at the time of the loss.

VI.

Plaintiff contends and defendant denies that its agreement to furnish monthly reports of the amounts of specific or non-provisional insurance in effect from month to month is not a condition of promissory warranty but a simple promise only, the breach of which does not relieve defendant from any of its obligations under the policy but leaves defendant its remedy for breach of contract and damages resulting to it from such breach. [33]

VII.

Defendant contends and plaintiff denies that the reports of actual cash values given by the insured

are the sole basis of computing the premium earned under the policy.

VIII.

Defendant contends and plaintiff denies that the reports of actual cash values given by the insured are the sole basis of determining the amount of provisional insurance in effect under the policy at any given time.

IX.

Defendant contends and plaintiff denies that the reports of actual cash values given by the insured are the basis of determining whether or not to continue on the risk and whether there has been a material change in its liability in the risk.

ISSUES ON SPECIFIC POLICY PROVISIONS

Defendant's Contention:

I.

Paragraph 3 of the standard provisional stock form attached to the policy provides:

"The insured expressly agrees to file with this insurer, or its designated agent, after the close of the insured's business upon the last Saturday of each month, and before a loss shall have occurred, a true statement in writing of the value (as defined in Paragraph 4) of the stock covered hereunder at each location described in the 'Schedule Endorsement' as of the close of business on each Saturday of such month; and, if the insured so elect, such an amount in addition thereto as the insured shall estimate as sufficient to cover errors or omissions

in ascertaining such value; and the insured shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder.”

Defendant contends and plaintiff denies that the false statements of the amounts of non-provisional insurance in effect for the months of August through November constitute a breach of warranty by plaintiff, which was material to the risk, and that defendant would not have underwritten the coverage claimed by plaintiff at the premium earned on the basis of plaintiff’s reports.

II.

Paragraph 5 of the standard provisional stock form attached to the policy provides: [34]

“The amount of Insurance under this form, at any time at any location described in the ‘Schedule Endorsement,’ shall be determined by following the formula set forth in Sections 5A, 5B, 5C and 5D.

“Section 5A. As of the time at which insurance in force is to be determined, ascertain the value, as defined in Paragraph 4, in such location.

“Section 5B. Deduct from this value the amount of any non-provisional insurance against the hazards covered hereunder on said stock.

“Section 5C. If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3

shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated amount, if any) and the average of actual values as ascertained for the same Saturdays.

“Section 5D. 1. If the amount determined by Sections 5A, 5B and 5C is less than the ‘Limit of Insurance’ named in the ‘Schedule Endorsement,’ at such location, the amount thus determined shall be the ‘Amount of Insurance under this form.’

“2. If the amount determined by Sections 5A, 5B and 5C is equal to or greater than the ‘Limit of Insurance’ named in the ‘Schedule Endorsement’ at such location, the amount of the ‘Limit of Insurance’ so named shall be the ‘Amount of Insurance under this form.’ ”

Defendant contends and plaintiff denies that the amount of provisional insurance in effect on Building No. 2 on January 9, 1947, should be determined as follows:

Sec. 5A	
Actual value of the stock on January 9, 1947, as determined by the records of plaintiff.....	\$121,410.31
Sec. 5B	
Deduct amount of non-provisional or specific insurance ACTUALLY in effect on January 9, 1947.....	33,333.33
	<hr/>
	\$ 88,076.98

Sec. 5C (1)

The actual values and amounts as determined from the records of plaintiff for the month of November, 1946, the last month for which a report of actual cash value was filed prior to loss	\$153,593.49
Less actual, specific insurance ACTUALLY in effect on January 9, 1947	\$ 33,333.33

Actual value not covered by specific insurance.....\$120,260.16

Sec. 5C (2)

Values and amounts as determined from report of November, 1946:

Value of stock	\$153,593.49
Less specific insurance reported.....	50,000.00

Values reported not covered by specific insurance.....\$103,593.49

Sec. 5C (3)

Actual value not covered by specific insurance.....	\$120,260.16
Less value reported not covered by specific insurance....	\$103,593.49

Values under-reported

Sec. 5C (4)

Actual value of the stock on January 9, 1947, as determined by the records of plaintiff.....	\$121,410.31
Deduct amount of non-provisional, or specific insurance ACTUALLY in effect on January 9, 1947.....	\$ 33,333.33
	\$ 88,076.98
Less values under-reported	\$ 16,666.67

Sec. 5D

Amount of provisional insurance in force under the policy	\$ 71,410.31
---	--------------

Defendant contends in the alternative and plaintiff denies that the amount of provisional insurance in effect at the time of the loss should be computed pursuant to the above summary as follows:

Sec. 5A

Actual value of stock on January 9, 1947, as determined by the records of plaintiff	\$121,410.31
---	--------------

Sec. 5B

Deduct amount of non-provisional, or specific insurance reported in the last report of actual cash values filed prior to loss	\$ 50,000.00
	<hr/>
	\$ 71,410.31

Sec. 5C

No difference between actual cash value of stock for November, 1946, and reports of cash values of stock for said month.

Sec. 5D

Amount of provisional insurance in effect under the policy at time of loss	\$ 71,410.31
--	--------------

III.

Paragraph 7 of the standard provisional stock form attached to the policy provides:

“The premium earned under this policy shall be determined and an adjustment thereof made on each anniversary date hereof, or upon termination or cancellation of this policy based on the average of values filed with this insurer, or its designated agent, as required in Paragraph 3; but no premium shall be charged on any values in excess of the amount named as the ‘Limit of Liability Under This Policy,’ nor on any value protected by non-provisional insurance against the hazards covered hereunder reported in accordance with Paragraph 3.”

Defendant contends and plaintiff denies that under this provision of the policy it is precluded from assessing a premium against the amount of specific insurance over-reported, and that the sole basis for determining the earned premium is the reports of actual cash values filed with it by plaintiff, and

that defendant has received no consideration for the coverage here claimed by plaintiff.

IV.

Paragraph 8 of the standard provisional stock form attached to the policy provides:

“It shall be the privilege of the insured to make any changes desired by him in the last previously filed statement required in Paragraph 3 but such changes shall not be effective unless made in writing and filed with this insurer or its designated agent before a loss shall have occurred.”

Defendant contends and plaintiff denies that under this provision of the policy no change in reports of actual cash values filed with the Company by plaintiff can be made after a loss has occurred, and that thereby plaintiff is precluded from correcting the amounts of specific or non-provisional insurance reported.

V.

Paragraph 14 of the standard provisional stock form attached to the policy provides:

“Co-Insurance Clause: In consideration of the acceptance by the insured of the following Co-insurance Clause, a reduction from the established premium rate of \$. to \$. has been allowed on this insurance:

“In consideration of the rate and/or form under which this policy is written it is expressly stipulated and made a condition of this contract that the insured shall at all times maintain contribut-

ing insurance on each item of property insured by this policy to the extent of at least 100% of the [37] cash value at the time of the loss, and that failing to do so, the insured shall to the extent of such deficit bear his, her or their proportion of any loss "

Defendant contends and plaintiff denies that pursuant to this provision defendant was under-insured in the amount of \$16,667.67 and that thereby plaintiff must bear such proportion of the total loss as the amount of under-insurance bears to the actual value of the insured stock at the time of the fire, or the sum of \$16,563.50.

VI.

Defendant contends and plaintiff denies that plaintiff should be estopped to claim that it had any less than \$50,000.00 specific insurance on Building No. 2.

Plaintiff's Contention:

VII.

Plaintiff contends and defendant denies that the formulae set forth under defendant's contentions, based upon Sections 5A, 5B, 5C and 5D, are erroneous in that they interpret the word "value" as used in said paragraphs to include not only the value of the stock but the amount of non-provisional insurance, whereas Paragraph 4 of the standard provisional stock from endorsement of the policy specifically defines "value" to include only the value of the stock and not the amount of non-provisional insurance.

VIII.

Plaintiff contends and defendant denies that the true and only appreciable formula for determining the amount of provisional insurance is contained in Sections 5A and B of the provisional stock form endorsement and should be applied here as follows:

Sec. 5A	
Actual value of the stock on January 9, 1947, as determined by the records of plaintiff.....	\$121,410.31
Sec. 5B	
Deduct the amount of non-provisional insurance against the hazards covered by the policy in effect on January 9, 1947	33,333.33
<hr/>	
Leaving a balance of	\$ 88,076.98

IX.

Plaintiff contends and defendant denies that the co-insurance clause hereinabove referred to as Section 14 of the standard provisional form endorsement has no application in this case because the plaintiff maintained and had in effect at the time of the loss contributing insurance on each item of property insured by defendant's policy to the extent of at least 100% of the actual cash value of the property at the time of the loss.

X.

Plaintiff contends and defendant denies that plaintiff should not be estopped to claim and prove that it had in effect at the time of the loss less than \$50,000.00 insurance on Building No. 2 because it reported a lesser amount of provisional insurance in good faith, as a result of pure error,

without knowledge of the error and without intent to deceive or defraud the defendant as a result thereof, and without the intention that the defendant would rely solely on its reports in fixing and adjusting its final premium.

EXHIBITS

Plaintiff offered for inspection by defendant and had marked for identification certain documents as pretrial exhibit herein. Defendant having inspected said documents, admitted the authenticity and genuineness thereof and waived all objections to their admissibility in evidence, except objections going to the relevancy, materiality or competency of said exhibits, which were identified in the record as follows:

No. 1. Insurance policy No. 133021 issued to defendant to plaintiff.

No. 2. Letter dated August 20, 1946, from The Mill Mutuals to Grange Oil Company.

No. 3. Letter dated October 2, 1946, from The Mill Mutuals to Monroe Feed Store.

No. 4. Letter dated February 11, 1947, from The Mill Mutuals to Grange Oil Company.

No. 5. Copy to letter dated February 18, 1947, from Mark V. Weatherford to Michigan Millers Mutual Fire Ins. Co.

No. 6. Document entitled "Sworn statement in proof of loss," proposed proof of loss submitted by defendant to plaintiff.

No. 7. Carbon copy of letter dated March 10, 1947, from Mark V. Weatherford to Michigan Millers Mutual Fire Ins. Co. [39]

No. 8. Carbon copy of proof of loss submitted to defendant by plaintiff.

No. 9. Letter dated March 11, 1947, from The Mill Mutuals to Mark V. Weatherford.

No. 10. Letter dated April 14, 1947, from The Mill Mutuals to Grange Oil Company.

No. 11. Carbon copy of letter dated April 24, 1947, from Grange Oil Company to The Mill Mutuals.

No. 12. Letter dated May 8, 1947, from The Mill Mutuals to Grange Oil Company.

No. 13. Carbon copy of letter dated June 12, 1947, from Manager of Grange Oil Company to The Mill Mutuals.

No. 14. Letter dated May 19, 1947, from law offices of Shank, Belt, Rode & Cook to Messrs. Weatherford & Thompson.

No. 15. Carbon copy of resolution of Board of Directors of Grange Oil Company, bearing date of May 28, 1947, unsigned.

No. 16. Tabulation of figures bearing heading, "Grange Oil Company of Linn and Benton Counties, Monroe, Oregon; Fire: January 9, 1947.

Defendant offered for inspection by plaintiff and had marked for identification certain documents as pretrial exhibits. Plaintiff having inspected said documents, admitted the authenticity and genuineness thereof and waived all objections to their admissibility in evidence, except objections going to the relevancy, materiality or competency of said

exhibits, which were identified in the record as follows:

No. 17. Resolution of plaintiff, dated May 28, 1947, embodying the agreement between plaintiff and defendant as to the payment and acceptance of the undisputed portion of the loss.

No. 18. Report of actual cash values made by plaintiff for the month of May, 1946.

No. 19. First report of actual cash values made by plaintiff for the month of June, 1946.

No. 20. Corrected report of cash values made by plaintiff for the month of June, 1946.

No. 21. Report of actual cash values made by plaintiff for the month of July, 1946.

No. 22. Reports of actual cash values made by plaintiff for the months of August, September, October and November, 1946.

No. 23. Work sheet of defendant, used in computing earned premium for the policy year May 1, 1946, to May 1, 1947.

No. 24. Provisional ledger sheet of defendant, showing posted average values for the stock in Building No. 2 for the policy year.

No. 25. Copy of letter of defendant to plaintiff dated July 10, 1946. [40]

No. 26. Copy of letter of defendant to plaintiff dated November 4, 1946.

Defendant reserves pretrial Exhibit 27 for the reports of actual cash values for the remainder of the year, which documents were exhibited to plain-

tiff and with respect to which plaintiff waives all identifying proof and reserves objection only as to the relevancy, materiality and competency of said exhibit.

XI.

Plaintiff has demanded in its complaint the sum of \$1500.00 as reimbursement to it for attorneys' fees in the institution, maintenance and prosecution of this action. Defendant admits that if plaintiff prevails in the action it would be entitled to a reasonable attorneys' fee and stipulates with plaintiff that the amount of the fee, in the event plaintiff prevails, may be fixed by the court with or without expert testimony, as the court may desire.

XII.

The parties agree that all issues of fact and law herein may be tried by the court without the intervention of a jury.

ORDER

It now appearing to the court that the foregoing is an appropriate statement of the pretrial proceedings,

It Is Ordered that the pretrial conference in this case having been held and participated in by all parties, the pleadings now pass out of the case and the foregoing be and the same is adopted as the Pretrial Order which shall govern the course of the trial and shall not be hereafter amended except by consent of the parties or by the Court to prevent manifest injustice.

Done and Dated in open court this 28th day of May, 1948.

CLAUDE McCOLLOCH,
District Judge.

Approved by:

/s/ HUGH L. BIGGS,
Of Counsel for Plaintiff.
/s/ JAMES K. BUELL,
Of Counsel for Defendant.

[Endorsed]: Filed May 28, 1948. [41]

[Title of District Court and Cause.]

DEFENDANT'S EXHIBIT No. 24

Provisional Ledger Sheet of Defendant Showing
Posted Average Values for the Stock in Building
No. 2 for the Policy Year:

Assured: Monroe Feed Store.

Risk: Frame Warehouse, Seeding Cleaning, Plant
No. 2.

Year: 1946.

Date	Weekly Values	Date	Weekly Values
8-24-46	\$ 133,223	11-23-46	\$ 102,299
8-31-46	124,737	11-30-46	100,704
9- 7-46	120,995	12- 7-46	124,244
9-14-46	116,963	12-14-46	126,153
9-21-46	134,636	12-21-46	121,820
9-28-46	108,468	12-28-46	110,777
10- 5-46	105,018	1- 4-47	92,896
10-12-46	104,618	1-11-47 .....	.....
10-19-46	107,603	1-18-47 .....	.....
10-26-46	106,403	1-25-47 .....	.....
11- 2-46	106,403		
11- 9-46	103,867		
11-16-46	104,695		
			\$2,256,522

DEFENDANT'S EXHIBITS Nos. 18, 19, 20,
21, 22 and 27

The following is a tabulation of the data contained in the above exhibits which were the reports of actual cash values made by plaintiff to defendant for the twelve months: May, 1946, through April, 1947, inclusive, and which data was contained on printed forms prefaced by the following representation:

“Following is a true statement of the actual cash values of all stocks located at the stations and in the buildings designated in the first column at the close of business upon each Saturday for the month of, 19.., as required under Paragraph 3 of the form attached to our Provisional Policies and all Non-Provisional Fire Insurance on such stock.

“We understand that if the average of the values entered in this statement is less than the average of actual cash values for the same days for which this statement is filed, the difference, in case of loss, shall be deducted from the actual cash value at the time of such loss, and the remainder (after deducting Non-Provisional Insurance, if any) shall constitute the actual amount of insurance in force under all policies covering under the Provisional Form, subject, however, to all of the conditions and limitations of such policies.”

[43]

REPORT OF ACTUAL CASH VALUES

May, 1946, through April, 1947

Month	Risk	1st week	2nd week	3rd week	4th week	5th week*	Non-Provisional Stock Ins.
May	Feed & Grain Plants.....	\$ 26,000.00	\$ 26,000.00	\$ 26,000.00	\$ 26,000.00	\$	\$
June	Feed & Grain Plants.....	-----	-----	-----	-----	-----	-----
	(corrected Report)	30,000.00	32,000.00	38,000.00	40,000.00	40,927.23	50,000.00
July	Feed & Grain Plants.....	45,000.00	82,000.00	136,079.15	244,328.29	-----	50,000.00
	(Posted)	-----	32,000.00	86,079.00	194,328.00	-----	-----
August	Plant No. 1	125,152.20	127,755.98	145,134.11	149,004.02	142,409.91	50,000.00
	Plant No. 2	151,647.00	177,714.12	178,893.12	183,223.30	174,737.26	50,000.00
	Flax Plant	78,967.75	107,756.81	115,207.16	115,207.16	115,207.16	30,000.00
Sept.	Plant No. 1	152,347.43	155,785.49	129,956.62	120,615.93	-----	50,000.00
	Plant No. 2	170,995.41	166,962.76	184,636.20	158,468.48	-----	50,000.00
	Flax Plant	115,207.16	103,322.52	76,336.59	56,646.59	-----	41,000.00
October	Plant No. 1	104,819.66	103,687.57	101,756.29	100,795.37	-----	50,000.00
	Plant No. 2	155,018.48	154,618.48	157,602.57	156,402.57	-----	50,000.00
	Flax Plant	46,172.98	39,280.43	32,179.15	25,620.23	-----	-----

Report of Actual Cash Values—(Continued)

May, 1946, through April, 1947

Month	Risk	1st week	2nd week	3rd week	4th week	5th week	Non-Provisional Stock Ins.
November	Plant No. 1	93,376.30	105,785.93	103,203.75	106,252.90	102,958.20	50,000.00
	Plant No. 2	156,402.57	153,867.40	154,695.20	152,298.60	150,703.62	50,000.00
	Flax Plant	25,620.23	15,956.10	.....	.....	.....	.....
December	Plant No. 1	99,423.82	96,752.39	76,171.44	80,507.39	.....	25,000.00
	Plant No. 2	149,243.50	151,153.23	146,819.56	135,777.18	.....	25,000.00
	— Note—Received after loss						
January	Plant No. 1	83,660.01	80,226.77	76,723.17	74,136.93	.....	41,667.00
	Plant No. 2	126,228.93	.....	.....	.....	.....	33,000.00
February	Feed & Grain Mill..	78,479.97	73,813.08	75,132.65	77,533.70	.....	41,667.00
March	Feed & Grain Mill.....	74,771.40	74,053.05	72,467.12	70,582.53	53,196.31	41,667.00
April	Feed & Grain Mill.....	50,912.30	43,537.78	47,412.75	43,866.26	.....	66,667.00

(Duly Verified.)

In the District Court of the United States
for the District of Oregon

Civil No. 4023

[Title of Cause.]

Copies of Plaintiff's Exhibit No. 2 and Defendant's
Exhibits Nos. 25 and 26 for Record on Appeal

PLAINTIFF'S EXHIBIT No. 2

“August 20, 1946.

“Grange Oil Company of Linn
and Benton Counties

Monroe, Oregon

Attention: Mr. Jones, Mgr.

“Gentlemen:

“This will confirm our telephone conversation of yesterday regarding additional insurance on stock in Plants No. 1 and No. 2 at Monroe and the flax warehouse outside of Monroe.

“Regarding Plant No. 1, we are establishing a limit effective August 19, of \$120,000. We understand you have specific insurance applying in this house of \$37,500 which will give you a total protection of \$157,500 as of this date.

“Regarding Plant No. 2 we have established a limit of \$145,000 which with the specific insurance of \$37,500 will give you total protection of \$182,500 in this house.

“Regarding the flax warehouse we have established a limit of \$86,000 there which with the \$30,000 specific insurance gives you a total protection of \$116,000 in this house.

“Should your values increase in any of the above houses, we suggest that you place any additional insurance required through your local agent as we have now about all we can handle in the above-mentioned locations. [47]

“In looking over Michigan Millers Policy 133021, your provisional policy covering stock, we note that the old mill, elevator and warehouse and the “Red” warehouse and the S. P. Depot building were included in the coverage. In our conversation yesterday we apparently overlooked establishing a limit on these houses. We can include them under Item No. 1 at the present limit if that is satisfactory with you, or we can establish separate limits on these auxiliary houses if you so desire but please let us know how you want it handled.

“Very truly yours,

THE MILLS MUTUALS,
/s/ N. J. SANKELA,
Ass't Manager.”

DEFENDANT'S EXHIBIT No. 25

“July 10, 1946.

“Monroe Feed Store
Monroe, Oregon

“Gentlemen:

“We are in receipt of your report of values for the month of June in which you show no values for the month.

“It seems rather strange that a business of this size would have no values on stock unless of course

you have some specific insurance which was mentioned in some correspondence some time ago. With the thought in mind that this provisional policy is not fully understood, we would call your attention to the fact that under the terms and requirements of that policy all values in the house must be reported to us. Then if there is any specific insurance, it is shown out in the last column and if it exceeds the actual values, then there would be no liability under our policy.

“Therefore on the basis of the policy coverage and requirements, we will appreciate it if you will make up a new form for June showing the total values in the plant and the amount of specific insurance in the last column. That will enable us to make the proper entry here. [48]

“If any further information is desired regarding this coverage and its requirements, we would appreciate your request for further information.

“Very truly yours,

THE MILLS MUTUALS,

By,

Manager.”

DEFENDANT’S EXHIBIT No. 26

November 24, 1946.

“Monroe Feed Store
Monroe, Oregon

“Gentlemen:

“We are in receipt of your report of values for the month of October. You have a \$200,000 limit

under Item No. 1 and have only \$100,000 of value. We are merely calling this to your attention because you have \$50,000 of specific insurance and you probably don't need to continue it if you do not want to.

"On Item No. 2 you are still over our limit but a portion of the specific insurance could be discontinued if you wanted to do so.

"Very truly yours,

THE MILLS MUTUALS,
By
Manager."

(Duly Verified.)

[Endorsed]: Filed Oct. 3, 1948. [49]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

I don't feel that a clause in an insurance contract should be given the legal effect of a warranty, unless the policy makes it plain that this was intended. It is not plain in this case. Therefore, testing the situation by the usual rule of damages, plaintiff is liable for the premium, while defendant remains liable for the insurance.

I would like to settle the Findings next week.

Dated August 30, 1948.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Aug. 30, 1948. [51]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came regularly on for trial before the undersigned, a judge of the above-entitled court, on the 28th day of May, 1948. Plaintiff appeared through its attorneys, Mark V. Weatherford of Weatherford & Thompson, Albany, Oregon, and Hugh L. Biggs of Hart, Spencer, McCulloch & Rockwood, Portland, Oregon, and defendant appeared through its attorneys, James K. Buell and Earl S. Nelson of Griffith, Peck, Phillips & Nelson. The issues of fact and law having been set forth in a pretrial order approved by the parties and signed by the court, and the parties having waived trial of the fact issues by a jury and agreed to try all issues of fact and law before the court without a jury, they thereupon introduced testimony and evidence in support of their respective cases and thereafter argued their contentions of fact and law to the court. The court having thereafter taken the case under advisement, and having fully and carefully considered the evidence and law bearing on the issues, and being now fully advised, makes the following

FINDINGS OF FACT

I.

Plaintiff is now and at all the times material herein was a cooperative corporation organized and existing under and by virtue of the laws of

the State of Oregon. It was and is now engaged in operating a general feed and seed cleaning business, in connection with which it owns and operates certain buildings within the City of Monroe, Benton County, Oregon, including a certain seed cleaning plant and warehouse, in the policy and hereinafter referred to as Building No. 2. [52]

II.

Defendant is and at all times herein material was a corporation organized and existing under and by virtue of the laws of the State of Michigan, is and was licensed to engage and was engaged in the business of writing fire insurance in the State of Oregon.

III.

A diversity of citizenship exists between the parties and the amount in controversy between them exceeds \$3,000.

IV.

On May 1, 1943, defendant issued its fire insurance policy No. 133021, in the form required and authorized by the statutes of the State of Oregon, to Theodore Kowalski, the then owner of said Building No. 2, insuring the owner thereof against loss of the contents of said Building No. 2 by fire. Said policy was issued for a period of five years, ending May 1, 1948. The maximum limit of liability of the defendant for loss of the contents of said Building No. 2 was \$145,000. Said policy bore a "Standard Provisional Stock Form" endorsement. Under said policy and its endorsement de-

fendant's liability in case of loss, subject to the over-all limit of \$145,000, was to be determined in accordance with the formula set forth in section 5 of said Standard Provisional Stock Form, which provided generally that the amount of provisional insurance available to the insured would be the difference between the actual value of the stock destroyed by fire and the actual amount of specific fire insurance carried by the insured in other insurance companies and available to the insured at the time of the fire. The policy provided that the insured pay a provisional premium based upon an amount equal to 25% of the limit of liability of the policy at the beginning of each policy year. The insured agreed, in consideration of the insurer's obligations, to report at the end of each month during the policy year the value of goods on hand at the close of business on Saturday of each week of the month for which the report was rendered and the amount of specific insurance on the goods covered by the policies carried by the insured in other insurance companies. The actual and total amount of the premium to be paid by the insured under the policy was to be determined at the end of the policy year [53] or at the time of any loss or termination of the policy prior to the end of the policy year on the basis of the monthly report submitted by the insured. A copy of the Standard Provisional Stock Form endorsement attached to said policy is marked "Exhibit A," attached hereto and made a part of these findings.

V.

On May 1, 1944, Theodore Kowalski, the named insured under said policy at the time of its issuance and the then owner of Building No. 2, conveyed to plaintiff said Building No. 2, and with the consent of the defendant assigned to plaintiff said policy No. 133021. Continuously thereafter to and including the date of loss by fire hereinafter referred to, plaintiff paid the premiums required and maintained said policy in full force and effect.

VI.

On January 9, 1947, while said policy of insurance was in full force and effect, a fire destroyed the stock of goods in said Building No. 2. The net value of the stock of goods destroyed, that is, after deduction of salvage, was \$120,656.42. On the date of said fire there were in full force and effect two policies of specific insurance in an aggregate amount of \$33,333.33 issued to plaintiff by insurance companies other than defendant and covering the contents of said Building No. 2.

VII.

Due to error, inadvertence and mistake, plaintiff in good faith reported to defendant in the months of August, September, October and November of 1946 that plaintiff had \$50,000 of specific fire insurance in insurance companies other than defendant on the contents of said Building No. 2, whereas in truth and fact plaintiff had only \$33,333.33 of specific fire insurance on the contents of said Build-

ing No. 2 during the months of August, September, October and November of 1946. The error was not discovered by either of the parties hereto until soon after the fire occurred and the investigation and adjustment of the loss resulting therefrom were being made. [54]

VIII.

Notice of said fire and proof of loss thereunder were duly and regularly given by plaintiff to defendant. The amount of the loss claimed by plaintiff was \$87,323.09, being the difference between the net value of the goods destroyed, that is, \$120,656.42, and the actual amount of specific fire insurance at the time of the fire, that is, \$33,333.33. Defendant refused to pay plaintiff's said claim in full but has paid to plaintiff the sum of \$70,966.89, being the difference between the net value of the goods destroyed, \$120,656.42, and the amount of specific fire insurance reported by plaintiff, plus certain adjustments agreed to by the parties not here material. Said payment was made by defendant and received by plaintiff under a stipulation between the parties that such payment was without prejudice to the position of either of the parties in any manner whatsoever in the event of litigation with respect to the balance claimed by plaintiff to be due it under policy, that is, \$16,356.20.

IX.

On the 24th day of April, 1947, plaintiff notified defendant that it claimed payment of the said sum

of \$16,356.20, which said sum defendant has wholly failed, neglected and refused to pay.

X.

Plaintiff was required to and did employ attorneys to institute and prosecute this action and necessarily incurred legal fees in connection therewith in the reasonable amount of \$1500. (Mc.C.)

From the foregoing findings of fact the court draws the following

CONCLUSIONS OF LAW

I.

This court has jurisdiction of the parties to and the subject matter of this case.

II.

Plaintiff's obligation, as set forth in section 3 of the Standard Provisional Stock Form endorsement on policy No. 133021, to report the amount of specific insurance in force on the goods covered by defendant's policy did not constitute a promissory warranty but merely an independent promise.

III.

Plaintiff's error in reporting to defendant the amount of specific insurance in effect did not relieve defendant from liability to pay the full amount of plaintiff's loss, less the actual amount of specific insurance carried by plaintiff on the insured goods.

IV.

The amount of the loss for which defendant became liable to plaintiffs under its policy as a re-

sult of the fire was \$87,323.09. To said sum should be credited the amount of \$70,966.89, leaving a balance due plaintiff from defendant, as of the date of said credit, in the sum of \$16,356.20.

V.

Plaintiff is entitled to judgment against defendant in the principal amount of \$16,356.20, together with interest at the rate of 6% per annum from and after the 24th day of April, 1947, together with attorneys' fees in the amount of \$1500, and for its costs and disbursements to be taxed herein.

Dated this 20th day of September, 1948.

CLAUDE McCOLLOCH,
District Judge. [56]

EXHIBIT A

Standard Provisional Stock Form
Annual Settlement

Selling Price Basis

1. On stock consisting of grain and seeds, stock in process, finished stock and all other merchandise and supplies, not otherwise insured and not more hazardous, handled or used by the insured in their business, their own, or held by them in trust, or on storage if in case of loss the insured is legally liable therefor; all while contained in the building or buildings as located and described in the "Schedule Endorsement" attached hereto, or while in or on cars or trucks within 100 feet of said buildings, except when carrier is liable.

2. It is understood that any specific amount of insurance named in this policy, or in certificates issued hereunder, and the first and subsequent annual premiums to be paid therefor are only provisional; and that the amount of insurance hereunder at any time on the stock described in Paragraph 1 shall be determined by the procedure outlined in Paragraph 5.

3. The insured expressly agrees to file with this insurer, or its designated agent, after the close of the insured's business upon the last Saturday of each month, and before a loss shall have occurred a true statement in writing of the value (as defined in Paragraph 4) of the stock covered hereunder at each location described in the "Schedule Endorsement," as of the close of business on each Saturday of such month; and, if the insured so elect, such an amount in addition thereto as the insured shall estimate as sufficient to cover errors or omissions in ascertaining such value; and the insured shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder.

4. It is agreed that wherever the term "Stock" is used in this form it shall be held to include all property covered hereunder as described in Paragraph 1 hereof. It is further agreed that wherever the term "Value" is used in this form it shall apply in the manner set forth in sections (4a), (46) and (4c) below at the location and at the time when such ascertainment of value is required by the conditions of this policy:

(4a) The value of stock, other than that manufactured by the insured, held for local or retail sale or for manufacturing purposes shall be the cost of replacing such stock.

(4b) The value of stock, other than that manufactured by the insured, held for shipment shall be the established cash shipping value of stock of like grade and quality. [57]

(4c) The value of stock manufactured by the insured shall be the average carlot selling price.

5. The amount of Insurance under this form, at any time, at any location described in the "Schedule Endorsement," shall be determined by following the formula set forth in Sections 5A, 5B, 5C and 5D.

Section 5A. As of the time at which insurance in force is to be determined, ascertain the value, as defined in Paragraph 4, in such location.

Section 5B. Deduct from this value the amount of any non-provisional insurance against the hazards covered hereunder on said stock.

Section 5C. If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3 shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated amount, if any) and the average of actual values as ascertained for the same Saturdays.

Section 5D. 1. If the amount determined by Sections 5A, 5B and 5C is less than the "Limit of Insurance" named in the "Schedule Endorsement," at such location, the amount thus determined shall be the "Amount of Insurance under this form."

2. If the amount determined by Sections 5A, 5B and 5C is equal to or greater than the "Limit of Insurance" named in the "Schedule Endorsement" at such location, the amount of the "Limit of Insurance" so named shall be the "Amount of Insurance under this form."

6. It is understood, however, that the amount of insurance under all policies covering under this form at each location shall not exceed the sum set opposite such location under the heading "Limit of Insurance"; and that the proportion of such insurance covered under this policy shall be the percentage of such insurance set opposite such location under the heading "Percentage of Insurance Under This Policy"; and in no event shall such proportion exceed the sum set opposite such location under the heading "Limit of Liability Under This Policy."

7. The premium earned under this policy shall be determined and an adjustment thereof made on each anniversary date hereof, or upon termination or cancellation of this policy based on the average of values filed with this insurer, or its designated agent, as required in Paragraph 3; but no premium shall be charged on any values in excess of the amount named as the "Limit of Liability Under This Policy," nor on any value protected by non-provisional insurance against the hazards covered

hereunder reported in accordance with Paragraph 3.

8. It shall be the privilege of the insured to make any changes desired by him in the last previously filed statement required in Paragraph 3 but such changes shall not be effective unless made in writing and filed with this insurer or its designated agent before a loss shall have occurred.

9. It is agreed that in the event of a loss a premium for the unexpired portion of the policy year based upon the amount of loss paid hereunder shall at once be due and payable.

10. Subject to all the terms and conditions of this policy, loss, if any, to be adjusted with the insured named herein and payable to the insured or order endorsed thereon for purposes of collateral security; but this insurance is void as to any subsequent owners or purchasers of the stock described herein.

11. This insurance shall not inure in any event to the benefit of any carrier.

12. This insurance does not cover storage or elevator charges.

13. The liability of this company for any or all of the hazards covered under this policy shall not exceed the amount stated in this policy and shall be subject to all of the terms and conditions specified herein.

14. Co-insurance Clause: In consideration of the acceptance by the insurance of the following Co-insurance Clause a reduction from the estab-

lished premium rate of \$. to \$. has been allowed on this insurance: In consideration of the rate and/or form under which this policy is written it is expressly stipulated and made a condition of this contract that the insured shall at all times maintain contributing insurance on each item of property insured by this policy to the extent of at least 100% of the actual cash value at the time of the loss, and that failing to do so, the insured shall to the extent of such deficit bear his, her or their proportion of any loss.

15. If this policy be divided into two or more items as shown by the Schedule Endorsement attached hereto, all the foregoing conditions and limitations shall apply to each item separately.

16.

17.

18. [59]

19.

20.

21.

Attached to and made part of policy No. 133021 of the Michigan Millers Mutual Fire Insurance Company, Lansing, Michigan.

Dated May 1, 1943 (GT)

B. L. HEFLER,
Agent.

Selling Price Basis Form No. 156 M.M.F.P.B.
4-41.

(Acknowledgment of Service.)

[Endorsed]: Filed September 20, 1948. [60]

In the District Court of the United States
For the District of Oregon.

Civil No. 4023

GRANGE OIL COMPANY OF LINN & BEN-
TON COUNTIES, a co-operative corporation,
Plaintiff,

vs.

MICHIGAN MILLERS MUTUAL FIRE IN-
SURANCE COMPANY, a Michigan corpora-
tion,

Defendant.

JUDGMENT

This cause came regularly on for trial before the undersigned, a judge of the above entitled court, on the 28th day of May, 1948. Plaintiff appeared through its attorneys, Mark V. Weatherford of Weatherford & Thompson, Albany, Oregon, and Hugh L. Biggs of Hart, Spencer, McCulloch & Rockwood, Portland, Oregon, and defendant appeared through its attorneys, James K. Buell and Earl S. Nelson of Griffith, Peck, Phillips & Nelson. The issues of fact and law having been set forth in a pretrial order approved by the parties and signed by the court, and the parties having waived trial of the fact issues by a jury and agreed to try all issues of fact and law before the court without a jury, they thereupon introduced testimony and evidence in support of their respective cases and thereafter argued their contentions of fact and law to the court. The court having

thereafter taken the case under advisement, and having fully and carefully considered all the issues of fact and law arising herein, and having heretofore found in favor of plaintiff and against defendant, and having made and entered its Findings of Fact and Conclusions of Law, and the case now coming on for judgment in accordance therewith,

It Is Considered, Ordered and Adjudged that plaintiff have and it is hereby granted judgment against defendant in the principal [61] sum of \$16,356.20, together with interest thereon at the rate of 6% per annum from and after the 24th day of April, 1947, and in the further sum of \$1500 attorneys' fees, and for plaintiff's costs and disbursements incurred herein, taxed at \$.....

Done and dated in open court this 20th day of September, 1948.

CLAUDE McCOLLOCH,
District Judge.

Entered in docket September 20, 1948.

[Endorsed]: Filed Sept. 20, 1948. [62]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Grange Oil Company of Linn & Benton Counties, a co-operative corporation, Plaintiff, and Weatherford & Thompson and Hart, Spencer, McCulloch & Rockwood and Hugh L. Biggs, its attorneys.

Notice is hereby given that Michigan Millers Mutual Fire Insurance Company, a Michigan corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above action on September 20th, 1948.

GRIFFITH, PECK,

PHILLIPS & NELSON,

By JAMES K. BUELL,

Attorneys for Appellant, Michigan Millers Mutual Fire Insurance Company.

[Endorsed]: Filed Oct. 14, 1948.

[63]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY ON APPEAL
PURSUANT TO RULE 75(d)

Defendant appellant having filed its notice of appeal from judgment of this Court to the Circuit Court of Appeals for the Ninth Circuit, and having designated portions of the record herein to be contained in the record on appeal, hereby files its statement of the points on which it intends to rely upon appeal, as follows:

I.

The Court erred in finding that Section 5 of the Standard provisional stock form of subject policy insurance provided generally that the amount of provisional insurance available to the insured

would be the difference between the actual value of the stock destroyed by fire and the actual amount of specific fire insurance carried by the insured in other insurance companies and available to the insured at the time of the fire.

II.

The Court erred in finding that the subject policy of insurance insured values which plaintiff had reported to be covered by specific insurance in other companies.

III.

The Court erred in finding that the obligation of plaintiff as set forth in Section 3 of the standard provisional stock form of subject policy to report the amount of specific insurance in force on the goods covered by defendant's policy did not constitute a promissory warranty. [64]

IV.

The Court erred in finding that plaintiff's error in reporting to defendant the amount of specific insurance in effect did not relieve defendant from liability to pay the full amount of plaintiff's loss less the actual amount of specific insurance carried by plaintiff on the insured goods.

V.

The Court erred in finding that the amount of subject loss for which defendant became liable to plaintiff under its policy as a result of the fire was the sum of \$87,323.09.

VI.

The Court erred in failing to find that the amount of insurance in effect under subject policy at the time of the loss as determined by the express terms of the policy and without regard to warranty was the sum of \$71,410.31.

VII.

The Court erred in finding that plaintiff was entitled to judgment in the sum of \$16,356.20 or in any amount.

GRIFFITH, PECK, PHILLIPS
& NELSON,

By JAMES K. BUELL,

Attorneys for Appellant, Michigan Millers Mutual
Fire Insurance Company.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 30, 1948. [65]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
ON APPEAL PURSUANT TO RULE 75(a)

Comes now defendant-appellant and designates the following portion of the record proceedings and evidence in the above cause to be contained in the record on appeal of said cause.

(1) Transcript of removal proceedings from Circuit Court of the State of Oregon for the County of Benton to this court (including petition for

removal, order of removal and other documents pertaining to such removal.)

(2) Complaint filed in the above court February 10, 1948.

(3) Answer filed in the above court February 13, 1948.

(4) Pre-trial order dated May 28, 1948.

(5) Transcript of testimony and proceedings at the trial of the above cause on May 28, 1948, including plaintiff's original exhibit No. 1 and defendant's original exhibits Nos. 19, 20 and 22.

(6) Tabulation of data contained in defendant's exhibits Nos. 18, 19, 20, 21, 22, 24 and 27. [66]

(7) Copies of plaintiff's exhibit No. 2 and Defendant's exhibits Nos. 25 and 26 for record on appeal.

(8) Memorandum of decision dated August 30, 1948.

(9) Findings of fact and conclusions of law dated September 20, 1948, showing date of entry thereof.

(10) Judgment dated September 20, 1948, showing date of entry thereof.

(11) Notice of Appeal to Circuit Court of Appeals for the Ninth Circuit showing date of filing thereof.

(12) Statement of points upon which appellant will rely on appeal.

(13) Designation of contents of record on appeal.

(14) Order to forward original exhibits as follows: plaintiff's exhibit No. 1 and defendant's exhibits Nos. 19, 20 and 22.

GRIFFITH, PECK, PHILLIPS
& NELSON,

By /s/ JAMES K. BUELL,

Attorneys for Appellant Michigan Millers Mutual
Fire Insurance Company.

(Acknowledgment of Service.)

[Endorsed]: Filed October 30, 1948. [67]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

On ex parte motion of defendant supported by stipulation of the parties, it is hereby considered and ordered that the time in which to file and docket the Record on Appeal of the above cause to the United States Circuit Court of Appeals for the Ninth District be and it hereby is extended to and including December 23, 1948.

Dated at Portland, Oregon, this 15th day of November, 1948.

JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed Nov. 15, 1948. [68]

[Title of District Court and Cause.]

ORDER

On motion of defendant-appellant, it is hereby.

Considered and Ordered that the clerk of this court forward to the Circuit Court of Appeals for the Ninth Circuit in connection with the appeal of the above-entitled cause plaintiff's original exhibit No. 1, and defendant's original exhibits Nos. 19, 20 and 22, in accordance with the usual practice of this court in regard to the safekeeping and transportation of original exhibits.

Dated at Portland, Oregon, this 30th day of October, 1948.

/s/ CLAUDE McCOLLOCH,

District Judge.

[Endorsed]: Filed November 30, 1948. [69]

[Title of District Court and Cause.]

DOCKET ENTRIES

1948

Feb. 10—Filed Transcript on Removal from Benton Co.

Feb. 10—Filed praecipe of Atty. Hugh L. Biggs to appear in this cause.

Feb. 13—Filed answer.

Mar. 1—Entered order setting for pre-trial Apr. 5, 1948. Fee.

Mar. 22—Entered order resetting for pre-trial on May 17, 1948 & order setting for trial on May 25, 1948, 10 a.m. McC.

1948

May 19—Filed pre-trial exhibits.

May 20—Entered order resetting for trial on May 27, 1948, 10 a.m. McC.

May 24—Entered order resetting for trial on May 28, 1948, 10 a.m. McC.

May 28—Record of trial before court, order to submit briefs & order continuing for argument, and filed & entered pre-trial order. McC.

June 4—Entered order setting for argument on the merits on June 19, 1948, 10 a.m. McC.

June 12—Filed Memorandum Brief for Plaintiff.

June 15—Entered order resetting for argument on merits on June 26, 1948. McC.

June 16—Filed transcript of proceedings of May 28, 1948.

June 26—Record of argument on merits. McC.

July 6—Filed Plaintiff's Reply Memorandum.

Aug. 19—Filed Plaintiff's comments as requested by trial judge & attached letter.

Aug. 30—Filed Memorandum opinion. McC.

Sept. 8—Entered order setting hearing on settlement of Findings of Fact & Conclusions of Law for Sept. 13, 1948, 2 p.m. McC.

Sept. 10—Entered order resetting hearing in settlement of Findings & Conclusions for Sept. 15, 1948. McC.

Sept. 13—Record of hearing in settlement of Findings & Conclusions, reserved. McC.

Sept. 20—Filed & entered Findings of Fact & Conclusions of Law. McC.

1948

Sept. 20—Filed & entered Judgment for ptff. for \$16,356.20 with interest at the rate of 6% from Apr. 24, 1947, and \$1500 atty. fees. McC.

Sept. 20—Entered judgment in Lien Docket.

Sept. 30—Filed cost bill of ptff. with attached notice.

Oct. 11—Filed supersedeas bond on appeal. Approved by Judge Fee.

Oct. 14—Filed Notice of Appeal by defendant.

Oct. 14—Copies of notice of appeal mailed to Hugh L. Biggs, Portland, & Mark Weatherford, Albany.

Oct. 15—Filed affidavit of Jas. K. Buell.

Oct. 15—Filed affidavit of mailing.

Oct. 23—Filed transcript of proceedings May 25, 1948, in duplicate.

Oct. 30—Filed statement of points.

Oct. 30—Filed designation of record.

Oct. 30—Filed motion of appellant to forward exhibits 1, 19, 20 and 22.

Nov. 15—Filed and entered order extending time to docket record on appeal.

Nov. 15—Filed stipulation.

Nov. 30—Filed and entered order to send original exhibits to Court of Appeals. [70]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,

District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 71, inclusive, constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 4023, in which Grange Oil Company of Linn and Benton Counties, a co-operative corporation, is plaintiff and appellee, and Michigan Millers Mutual Fire Insurance Company, a Michigan corporation, is defendant and appellant; that the said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file in my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of proceedings of May 28, 1948, taken and filed in this office in this cause, together with exhibits Nos. 1, 19, 20 and 22 filed in this cause.

I further certify that the cost of comparing and certifying the within transcript is \$37.35, and the

cost of filing notice of appeal is \$5.00, making a total of \$42.35, and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 2nd day of December, 1948.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. H. BUCK,
Chief Deputy. [71]

In the District Court of the United States
for the District of Oregon

Civil No. 4023

GRANGE OIL COMPANY OF LINN AND BEN-
TON COUNTIES, a Co-operative Corporation,
Plaintiff,

vs.

MICHIGAN MILLERS MUTUAL FIRE IN-
SURANCE COMPANY, a Michigan Corpora-
tion,

Defendant.

Portland Oregon, Friday, May 28, 1948

Before: Honorable Claude McColloch, Judge.

Appearances: Mr. Mark V. Weatherford (Weath-
erford & Thompson), and Mr. Hugh L. Biggs
(Hart, Spencer, McCulloch & Rockwood), Attor-
neys for Plaintiff. Mr. James K. Buell and Mr.

Earl Nelson (Griffith, Peck, Phillips & Nelson),
Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS OF TRIAL

Mr. Biggs: If your Honor please, we have prepared a pre-trial order which I think is now complete in all respects, but the draft of it was just given out before we came to court and I am not sure that counsel has had a chance to check all the provisions. [1*] It may be an expeditious way to proceed to start with the draft of the pre-trial order which would serve as an opening statement to your Honor unless you would rather we would take a few minutes longer between ourselves.

The Court: I have read the pleadings. Go ahead and put on your testimony.

Mr. Biggs: Very well.

Plaintiff's testimony:

M. J. LOONEY

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Weatherford:

Q. State your name, please, Mr. Looney.

A. M. J. Looney.

Q. Where do you live?

A. Five miles south of Albany, just off the 99-E highway.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

(Testimony of M. J. Looney.)

Q. What is your age? A. Fifty-six.

Q. What is your occupation? A. Farmer.

Q. How large a farm do you operate?

A. 800 acres.

Q. What position, if any, did you hold with the plaintiff, the [2] Grange Oil Company of Linn and Benton Counties, a co-operative corporation?

A. I am president of the board of directors.

Q. How many members are on the board of directors? A. Six.

Q. What occupations do they follow?

A. All farmers.

Q. And they live where?

A. In different sections of Linn and Benton Counties. The organization covers both counties.

Q. How many members do you have in the co-operative? A. 1700, about.

Q. What is the general purpose of the co-operative?

A. For mutual benefit in marketing crops and seed and feeds.

Q. In operating that business, what kind of business, if any, do you engage in?

A. A mill in Benton County, Oregon, and feed and seed business.

Q. What is the nature of the seed business?

A. The processing of seed; that is, as it comes from the farm, and cleaning it, and getting it ready for marketing purposes—rye grasses, vetches, clovers and fescue grasses, and all different types of seed and grains that are produced in this section—white oats and barley as well.

(Testimony of M. J. Looney.)

Q. What buildings did you use for that purpose?

A. Had three buildings, one that we had the office in, and [3] another that was a kind of a warehouse, and another a storage warehouse.

Q. What time of year would the seeds come into the building?

A. They usually start, the first seeds, right after the Fourth. English rye grass is the first seed.

Q. The Fourth of July?

A. Right after the Fourth of July.

Q. Then how long does it continue? First, what is done with the seeds when they come in?

A. The farmers haul their different crops in; then they are put through cleaners and cleaned and processed, sacked and made ready for the market.

Q. How long, ordinarily, does the operation continue from July 4th on through the rest of the year?

A. It takes pretty well up in late November by the time the crops are usually cleaned up, or even up to the first of the year.

Q. Before it is all shipped out?

A. Before it is all shipped out.

Q. And frequently a good deal later?

A. It is not all sold by that time. What I mean is, that the farmers generally have their crops cleaned by that time, but it isn't all sold or shipped, and runs into the next year.

Q. In the cleaning operation, just state in what condition the crops come to your warehouse?

(Testimony of M. J. Looney.)

A. Well, for instance, common rye grass is sowed with hay and [4] vetch and it makes a mixture of hay, vetch and rye grass, and then it is cleaned and separated and brought up to the required standards before shipping to markets in the other countries.

Q. Are other seeds mixed, also?

A. Yes, all types of seed more or less are intermingled. That is, the fescue will have rye grass with it and will have to be separated and the clovers will have foul stuff in the clover, such as sorrel, buckhorn and mustard.

Mr. Buell: I do not see, your Honor, how that line of testimony has any bearing on this particular case. It is going into the nature of the farming business rather than the claim on the warehouse.

Mr. Weatherford: I have finished the line of questioning that I intended, your Honor. I am simply showing the nature of the business, in general, that they were engaged in and work that was required and so forth, in order to show that the mistake was not willful. We claim that it was an inadvertence. I wish to show the nature of the business, which will be borne out by other witnesses, to show that the managers were pretty well occupied in handling this type of business.

Q. How often would your board of directors meet? A. Met once a month.

Q. How did you handle the management of this Monroe warehouse and business?

(Testimony of M. J. Looney.)

A. Hired a manager by the year and he carried on the business. [5]

Q. Were the details of the business up to him, and the marketing and so on?

A. Yes, we just checked the reports monthly and checked on the business.

Q. With reference to the handling of insurance——

A. That was up to the manager at all times.

Q. What was the policy of your co-operative with reference to carrying full insurance on all merchandise?

Mr. Buell: Object to that, your Honor, as immaterial and irrelevant as to what their policy was. The question is what insurance they had at the time of this loss.

The Court: Answer, subject to the objection.

(Question read.)

A. We expect the manager to have everything fully covered at all times in the co-operative, and all interests.

Q. (By Mr. Weatherford): When did you or the other members of the board, as far as you know, discover the error on the report that was made by the manager in this case?

A. The first I knew of it—I don't remember the date, but it was after the time we met in your office.

Q. Was that before or after the fire?

A. That was after the fire.

(Testimony of M. J. Looney.)

Q. Do you know whether it was soon after the fire or a considerable time?

A. Well, it was some little time after we was notified—Of [6] course, we had notification of the fire right away but we didn't know anything about the coverage of the insurance until we met with you in your office.

Q. Had there been some adjusters there at that time, the time that you had the meeting, adjusting the loss?

A. I couldn't say on that point.

Q. You don't recall? A. No.

Mr. Weatherford: We will offer in evidence the insurance policy, your Honor, No. 133021.

The Court: Do you have a lot of exhibits?

Mr. Weatherford: Yes.

The Court: Put them all in.

Mr. Weatherford: We offer all the exhibits that we have, No. 1 to No. 16, inclusive.

Mr. Biggs: Shall we take the time to mark them now?

The Court: The Reporter will mark them later. He will give them the same numbers as they are marked as pre-trial exhibits.

(Plaintiff's Pre-Trial Exhibits were thereupon received in evidence and marked as Trial Exhibits, as follows:)

PLAINTIFF'S EXHIBITS

1. Insurance Policy No. 133021 issued by Defendant to Plaintiff.

(Testimony of M. J. Looney.)

2. Letter dated August 20, 1946, from The Mill Mutuals [7] to Grange Oil Company.

3. Letter dated October 2, 1946, from The Mill Mutuals to Monroe Feed Store.

4. Letter dated February 11, 1947, from the Mill Mutuals to Grange Oil Company.

5. Copy of letter dated February 18, 1947, from Mark V. Weatherford to Michigan Millers Mutual Fire Insurance Company.

6. Document entitled "Sworn Statement in Proof of Loss," proposed proof of loss submitted by Defendant to Plaintiff.

7. Carbon copy of letter dated March 10, 1947, from Mark V. Weatherford to Michigan Millers Mutual Fire Insurance Company.

8. Carbon copy of proof of loss submitted to Defendant by Plaintiff.

9. Letter dated March 11, 1947, from The Mill Mutuals to Mark V. Weatherford.

10. Letter dated April 14, 1947, from The Mill Mutuals to Grange Oil Company.

11. Carbon copy of letter dated April 24, 1947, from Grange Oil Company to The Mill Mutuals.

12. Letter dated May 8, 1947, from The Mill Mutuals to [8] Grange Oil Company.

13. Carbon copy of letter dated June 12, 1947, from manager of Grange Oil Company to The Mill Mutuals.

14. Letter dated May 19, 1947, from law offices of Shank, Belt, Rode & Cook to Messrs. Weatherford & Thompson.

(Testimony of M. J. Looney.)

15. Carbon copy of resolution of board of directors of Grange Oil Company, bearing date of May 28, 1947, unsigned.

16. Tabulation of figures bearing heading "Grange Oil Company of Linn and Benton Counties, Monroe, Oregon; Fire; January 9, 1947."

Mr. Buell: Does the Court wish objections to any exhibits to be stated now?

The Court: You may state your objections during the recess or at any time during the trial, and the exhibits will all be admitted subject to whatever objection you may have to offer.

Mr. Weatherford: I think that is all the questions we have of this witness.

Mr. Buell: No questions.

(Witness excused.) [9]

VERNON C. JONES

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Weatherford:

Q. State your name, please.

A. Vernon C. Jones.

Q. What is your age?

A. Fifty-five.

Q. Where are you living now?

A. In Eugene.

(Testimony of Vernon C. Jones)

Q. Where were you living in 1946 and 1947, and prior thereto? A. Corvallis.

Q. What position, if any, did you occupy with the Grange Oil Company during the year 1946 and the year 1947?

A. I was manager of the Monroe Feed Store, and secretary and treasurer.

Q. When did your relationship cease?

A. On October 1st, 1947.

Q. State briefly the type of business that you conducted there for the plaintiff at Monroe?

A. Well, we were a co-operative cleaning warehouse and also a feed business. We would take seeds in from the farmers, weigh them up, give them a lot number and store them, and then process them or clean them later. The volume of business was around [10] \$600,000 a year that we did.

Q. When would the cleaning start?

A. It was almost continual with that particular warehouse. The capacity of our cleaning equipment was not equal to take care of the volume of seeds that we had brought in; took practically the full year. There would be our rush season when they would come in and then we would store and clean through the winter.

Q. What did you have in the way of cleaning equipment?

A. We had three cleaners, spirals, and other machinery for cleaning various seeds. There is a considerable difference in the type of machin-

(Testimony of Vernon C. Jones.)

ery. We had cleaning machines, agitators of different kinds, all different kinds of machines.

Q. What is the fact as to the operation of those machines as to requiring skill and constant supervision?

A. Well, there isn't any two farmers' seed that cleans alike. Your machine has to be continually changed. When you change lots you change the machine. Naturally, they have to be looked over.

Q. What is your experience in superintending and operating that type of machinery?

Mr. Buell: Object to that.

Q. (By Mr. Weatherford): Are you skilled at it?

Mr. Buell: We object to that line of testimony, your Honor. There is no issue here as to whether or not there was any intent to defraud on the part of the plaintiff, and I don't see how this testimony with regard to the nature of the cleaning and [11] processing of seeds bears on the construction of this policy of insurance.

The Court: He may answer, subject to the objection.

(Question read.)

A. Well, I have had a great many years' experience with machinery of that type, all types, in fact.

Q. (By Mr. Weatherford): What is the fact as to the situation regarding help during the year that this controversy arose?

A. Very hard to get help that was efficient.

(Testimony of Vernon C. Jones.)

Q. What was the situation as to the cleaning business itself? What attention did you have to give to it as superintendent and manager of the business?

A. Well, I had to practically watch over a lot and inspect the lot as it was being run.

Q. What other duties did you have with reference to receiving the crops from the various farmers?

A. Well, we had the selling end of it. We sold the seeds and took care of the shipping—management of the office.

Q. How about keeping the crops separate as to each farmer, the lots of seed?

A. Well, that is pretty hard to do; just got to be up on your toes and watch all the time. The cleaning men that operate the cleaners, cleaning a certain number of sacks, they might leave a few sacks in that lot that might get placed off separately and left and naturally the man would not have all of his seeds [12] cleaned. You had to be real careful to keep these lots separated during the wintertime. From the cleaner, each bag is marked with the man's number on it and stored separately—goes to the fumigator first on the vetches, and then stored in the warehouse.

Q. What is the purpose of the fumigation?

A. To kill the weevil in the grain.

Q. Did you also have charge of the insurance?

A. That is right. I had charge of all insurance to start with, and then instructed our employees,

(Testimony of Vernon C. Jones.)

our bookkeepers, to keep the inventory up and report.

Q. In your office how many employees did you have?

A. We had three besides myself.

Q. Who were the employees?

A. Miss Gilder, Mrs. Roach and Mrs. Miller.

Q. What part of the insurance business did Miss Gilder have to do with?

A. She naturally took care of the inventory and she reported, made the reports for me to sign; but if it came to raising the insurance, or if our inventory raised it, then I advanced our insurance. I would call and advance the insurance.

Q. How would you communicate that to the insurance agents?

A. By telephone.

Mr. Buell: Which insurance agent are you referring to?

Mr. Weatherford: I said "agents." I mean of the insurance [13] companies that you did business with.

Q. Who were the agents that you talked with?

A. With the Sun and Home, Jack Porter in Corvallis, and with The Mill Mutuals, Mr. Sankela of Seattle, and also Mr. Brockman—I don't remember the name. I can't say the name. I called and ordered insurance raised as the seed came in.

Q. Well, this letter from The Mill Mutuals, introduced in evidence as Plaintiff's Exhibit No. 2, under date of August 20, 1946, was that the result

(Testimony of Vernon C. Jones.)

of your first telephone conversation with The Mill Mutuals?

A. That was the result of a telephone conversation. I don't know if it may be the first, but it is the result of a telephone conversation.

Q. With whom? The one who signed the letter?

A. Yes, I believe the one that signed the letter.

The Court: What is the name on it?

Mr. Biggs: We haven't got the exhibit right here before us. Do you remember what the name of that gentleman is? It is Exhibit No. 2.

The Court: He is having trouble with the name. Somebody help him out on the name.

Mr. Biggs: Sankela is the author of the letter.

Q. (By Mr. Weatherford): How do you pronounce the name? A. Sankela.

Mr. Biggs: Sankela, if I am correct. [14]

A. Sankela. I don't pronounce the name the same as you do.

Q. (By Mr. Weatherford): During the year after that letter, did you have numerous telephone conversations with this gentleman, Mr. Sankela, over the telephone?

A. No. He was a pretty hard man to get hold of. I couldn't always get him, I will say that. He is a pretty hard man to get hold of, but we got someone in the office usually; but what the name was I won't say. I can't.

Q. Likewise with the other agent, Jack Porter?

A. That is right, with Jack Porter.

Q. What did you do if you wanted to raise the insurance with Jack Porter?

(Testimony of Vernon C. Jones.)

A. I would just go to the telephone and call up and tell him I wanted certain insurance on a certain warehouse, at the flax warehouse, No. 1 or 2. That is the way I did.

Q. By telephone? A. Yes.

Q. How long after the telephone conversation would you receive written evidence of the raising or lowering of your insurance?

A. Well, anywhere from a week or ten days, sometimes might be longer.

Q. How long did you number your buildings so as to identify them, the buildings that you were doing this business in?

A. I believe that was done by the former manager before I came in there. [15]

Q. How were they classified?

A. No. 1 and 2, and then we had one that was a red barn. We called it the hay barn, and we had certain storage in there, and we had certain storage in the Southern Pacific freight depot; we had storage, over a thousand ton of seed, at the flax plant during this time, around a thousand tons of seed, close to it.

Q. Where did you receive the seed, most of it?

A. Most of it was received at No. 1 warehouse and then directed to No. 1 or No. 2, depending on the seed, what variety.

Q. Did you make any raise in insurance there, and, if so, about when, with the companies represented by Jack Porter?

(Testimony of Vernon C. Jones.)

A. Took over the management on the 1st day of January, 1945, I believe—1946, that would be—and when the audit of the books was completed, which was somewhere around the 25th of January, the inventory showed \$130,000 worth and they had coverage with The Mill Mutuals of up to \$100,000, and the manager, the previous manager, was there, and I asked him if that was the proper amount of insurance, that I considered that it was low, and that we should get more if we could get it from The Mill Mutuals, and then I called Porter somewhere around between that and the 1st of February, and we got \$25,000 on No. 1 and \$25,000 on No. 2 buildings, the contents of the buildings, I should say.

Q. That is, the merchandise and seed in the buildings? [16]

A. That is right.

Q. Would that be constant now, that insurance? Was that constant? Did you always keep that amount?

A. With Mr. Porter we would keep that \$25,000 on either building continuously, as long as we were there.

Q. Did you raise that insurance or attempt to raise it at any time?

A. I did.

Q. When?

A. Somewhere in August, I would say.

Q. What year?

A. 1946.

Q. How did you raise it? What was your means of communication?

A. Telephone.

Q. With whom?

(Testimony of Vernon C. Jones.)

A. I meant to say Mr. Porter.

Q. Personally, or with someone in the office?

A. Oh, I couldn't say to that. Possibly it was the office help. I can't remember whether it was Mr. Porter or an office worker.

Q. What did you direct or request in the way of insurance?

A. I requested \$25,000 on either building, on No. 1 and No. 2.

Q. That is, a total of \$50,000?

A. \$50,000, that is right. Then we made up these reports to The Mills Mutual; Miss Gilder did. [17]

Q. What did you tell her?

Mr. Buell: Just a moment, for the record. We would like to have Mr. Porter identified in the record as to what companies he represented.

Mr. Biggs: I think we might stipulate, the Sun and the Home.

Mr. Buell: And that he had nothing whatsoever to do with the defendant, The Mills Mutuals.

Mr. Biggs: I think that is correct.

Mr. Weatherford: Yes.

Q. What companies did Jack Porter represent?

A. The Home Insurance Company and the Sun Insurance Company. He represents more, but those two——

Q. What caused you to call up his agency to increase this insurance by \$25,000 on No. 1 and by \$25,000 on No. 2?

(Testimony of Vernon C. Jones.)

A. Our inventory raised, more grain in, more seeds.

Q. Then, after you had this telephone conversation, did you report to Miss Gilder, or was she there in your hearing when you made the order?

A. Well, I would say she was there. She was there every day and the telephone was on the desk, and her desk was across from there. I reported that we had another \$25,000 on each building.

Q. What is the fact about your good faith in believing that you did have \$25,000 additional insurance at that time on Warehouse No. 2?

A. Well, we naturally believed we had and we reported it that [18] way.

Q. You reported to The Mill Mutuals that you did have that additional \$25,000 on them, which would have made \$50,000 on No. 2?

A. That is right.

Q. Who reported to you that the inventories required additional insurance?

A. Miss Gilder.

Q. Who made up the report that you sent to The Mill Mutuals stating that you did have \$50,000 on No. 2?

A. I would say Miss Gilder.

Q. Did you sign those reports?

A. I signed them, always.

Q. Did you send these reports in continuously from the time you made the raise in the insurance, as a matter of fact—

A. Yes.

Q. From the time of this telephone conversa-

(Testimony of Vernon C. Jones.)

tion in the summer of 1946 until the time of the fire, each month? A. Yes.

Mr. Buell: According to the pre-trial conference, the report for November was the last report made prior to the fire?

Q. (By Mr. Weatherford): Then, until the November report? A. Yes.

Q. During all that time, what did you actually believe was the amount of insurance that you had from Jack Porter's companies, [19] the Sun and the Home, or either of them, on this Building No. 2, the contents of Building No. 2?

A. \$50,000.

Q. When did you discover it was less than that amount?

A. I believe Mr. Sankela mentioned it to us first after the adjustment was made, I believe, or at that time.

Q. You mean after the fire?

A. After the fire.

Q. Mr. Sankela, of the defendant, The Mill Mutuals? A. Yes.

Q. State the circumstances under which he told you?

A. Well, he mentioned that he didn't know—that we only had \$33,330 on there, and we thought we had \$50,000, with Mr. Porter, with the Sun and the Home, and he didn't know what his company would do about that. I believe that was the words, as I remember, he said.

Q. Was he one of the adjusters?

(Testimony of Vernon C. Jones.)

A. That is right. Mr. Sankela was one of the adjusters.

Q. Mr. Sankela represented what company?

A. The Mill Mutuals or Michigan Millers.

Q. Who represented the Sun and the Home companies? A. Mr. Moe.

Q. Did the two of them work together?

A. That is right.

Q. You reached an adjustment as to the amount and value of the [20] contents of that building that was lost by fire, No. 2? A. That is right.

Q. After that was done, you say this conversation occurred? A. That is right.

Q. What did you do then?

A. If I remember right, it was late in the evening and, as soon the next morning as I could—These policies were in the bank vault at Monroe. As soon as I could, I got those and went to Porter's office to see whether we were short or whether we had \$50,000 on it.

Q. What else did you do after you went to Porter's office?

A. Well, I believe I contacted Mr. Weatherford, was the next step I did on it.

Q. That same day?

A. I think that same day. I am not sure. Yes, that same day.

Q. Was that the first time you actually knew that you did not have \$50,000?

A. That is right.

(Testimony of Vernon C. Jones.)

Q. And only had how much?

A. \$33,300 from the Sun and the Home—\$33,330 is what it was actually.

Q. In your business there, were there a number of insurance policies that came under your management? A. About seven.

Q. All different types of insurance? [21]

A. That is right.

Q. What is the fact about endorsements of various kinds being received by you on those various policies?

A. I don't understand that, Mr. Weatherford.

Q. Well, I am asking whether the insurance companies sent you endorsements to go on these policies? A. Yes, they did; that is right.

Q. Endorsements of various kinds?

A. That is right.

Q. When they came, what did you do with them?

A. Well, we used to have to go and get the policy.

Q. What?

A. We used to have to go and get the policy—Lots of times, maybe, that wasn't done for a day or two after they came—and attach them to the policy.

Q. Who did the attaching?

A. Miss Gilder, the bookkeeper.

Q. The policies, you say, were kept in the bank vault? A. That is right.

Q. Did you, in the conduct of your business, pay much attention to these endorsements when they came?

(Testimony of Vernon C. Jones.)

A. Didn't have the time. No, I didn't pay much attention. I couldn't.

Q. After this error was discovered, you found these policies Jack Porter had sent to you, sent to your company? [22] A. That is right.

Q. Had you ever read them or known the contents of them prior to the time that you have mentioned, after the fire?

A. I don't remember of reading them.

Q. If you had read them, you would have discovered the mistake, would you not?

A. That is right.

Mr. Nelson: That is objected to, your Honor, what he might have discovered when he had them there and could read them.

The Court: That is stricken.

Mr. Nelson: What is that, your Honor?

The Court: Stricken.

Q. (By Mr. Weatherford): Are you very familiar with insurance? A. I am not.

Q. This provisional insurance, so-called, in The Mill Mutuals, requires some audit or classification of your valuation and your stock on hand?

A. Yes, sir.

Q. Does it not? A. Yes, sir.

Q. What is the fact at the end of the year as to whether your company is audited or not?

A. The books are audited by our company the first of the year, by the auditor.

Q. Is that an independent auditor?

A. An independent auditor, that is right. [23]

(Testimony of Vernon C. Jones.)

Mr. Buell: What sort of an audit was made and when?

Mr. Weatherford: I am just showing that all of their business is audited every year, and then I was going to follow that up by showing if there had been a mis-valuation any time it would have been revealed in that audit; or if there was a mistake in the valuation or in the insurance, it would then have been discovered.

Mr. Buell: You mean an audit had been made?

Mr. Weatherford: No. I am maintaing that had not been made at the time of the fire. The fire occurred January 9th. It would have been made before the anniversary of the policy, which was in May.

Mr. Buell: It seems to me we are concerned with what has been done.

Mr. Weatherford: As to their method of doing business.

Mr. Buell: Not what might have been done.

Mr. Weatherford: I am trying to show their method of doing business, that is, the way they handled it.

Mr. Buell: If an audit was ever made, that audit is the best evidence of what is covered and what it would disclose and would not disclose.

Mr. Weatherford: We don't have it for this year.

Mr. Buell: I object to any testimony on the part of the plaintiff with regard to an audit.

(Testimony of Vernon C. Jones.)

Mr. Biggs: May I be heard one minute? [24]

The Court: Yes.

Mr. Biggs: The contention is made in the pre-trial order that the only possible information the company could have as a basis for adjusting its premium at the end of the year, the determination of the final premium, would be——

The Court: What company?

Mr. Biggs: The Mill Mutuals, the defendant in this case—was the interim report made by the plaintiff, the insured.

The Court: Whose contention is that?

Mr. Biggs: That is the defendant's contention in this case. They have said they were dependent solely on the interim reports that we made, and we want to show, in the normal course of business, that they would have had all this information given to them, and I think their policy in fact requires them to make an audit from the books at any time, to satisfy themselves.

Mr. Buell: The policy, your Honor, will speak for itself as to whether or not an audit is required and whether or not the defendant has the power to go in of its own accord and make an audit. The policy will disclose that there is no such provision.

The Court: He is just showing how he made his mistake.

Mr. Buell: He is showing how he made his mistake, but they are going to try and show that they would have picked up the error and we submit they

(Testimony of Vernon C. Jones.)

are not entitled to do it because it is in the nature of self-serving evidence.

The Court: Go ahead. [25]

Mr. Nelson: Of course, we do not have the audit here at all.

Q. (By Mr. Weatherford): What was the scope that you customarily followed or that was customarily followed by the auditor? What did he audit?

A. He audited the records entirely. He audited everything from the start of the year through.

Mr. Buell: Could we have a continuing objection to any testimony on the part of the plaintiff as to an audit?

The Court: How could he audit a telephone conversation?

A. Couldn't audit a telephone conversation; he couldn't, but he audited our records completely.

Q. (By Mr. Weatherford): For the year 1946 had that audit been started or completed?

A. It had not been started.

The Court: What is your testimony going to be as to why he did not get this insurance?

Mr. Weatherford: Only that the clerk misunderstood his order.

The Court: Porter's clerk?

Mr. Weatherford: Yes.

The Court: Are you going to produce the clerk?

Mr. Weatherford: We did not intend to. We admit they in good faith understood it as only \$25,000.

The Court: Porter? [26]

(Testimony of Vernon C. Jones.)

Mr. Weatherford: Porter's people, and they sent an endorsement, as they understood it, which was not seen by Mr. Jones, and that is all the evidence we will have on the subject.

Q. You were in my office at the time the board of this Grange Oil Company met, at the various times when they considered this controversy with The Mill Mutuals, were you not? A. Yes.

Q. And heard all these conversations and participated in them? A. Yes.

Q. And were you present when letters were written to The Mill Mutuals?

A. That is right. And later at the time the \$70,000 was paid.

Q. Do you remember the letter wherein we tendered the company an additional premium, if any? You were present when that letter was written?

A. That is right.

Q. I will get the number of the exhibit in a minute.

Mr. Biggs: I think it is Plaintiff's Exhibit No. 13.

Q. (By Mr. Weatherford): All right. Plaintiff's Exhibit No. 13, dated June 12, 1947, to The Mill Mutuals, and signed by yourself as manager of the Grange Oil Company, and in which it is stated "And we hereby tender you the full amount of the premiums on the actual risk which we claim you carried." Were you present when that letter,

(Testimony of Vernon C. Jones.)

dated June 12, 1947, was written and signed by you? A. I was. [27]

Q. At that time was the money available for the Grange Oil Company to pay it?

A. That is right, yes.

Q. At that time did you know what the actual amount of the premium for the risk that you claimed was carried was, amounted to?

A. No, I didn't.

Q. Or did you have any way of knowing that?

A. I had no way of knowing.

Q. At the time of the institution of the suit or the action in this case was the money available?

A. It was.

Q. And it is still, at this time?

A. It is still, at this time, yes.

The Court: Did Porter's company recognize this insurance?

Mr. Weatherford: Porter's company paid all the insurance that they actually wrote.

Mr. Biggs: Didn't pay the additional, no, your Honor.

The Court: They denied liability?

Mr. Weatherford: Yes. That was paid immediately, all of their insurance.

The Court: They deny liability on this insurance, that he says he put through on the telephone.

Mr. Weatherford: Yes.

Mr. Biggs: The order was for \$50,000, and they put in for [28] \$25,000 on each of the two buildings, and there is \$25,000 that they recognize they

(Testimony of Vernon C. Jones.)

were liable for. I just wondered if we made that clear to your Honor.

The Court: In other words, this case is being tried on the assumption that you didn't get the insurance until this telephone call.

Mr. Biggs: That is correct, didn't get the \$25,000.

Mr. Weatherford: And in this case there is \$16,000 odd which the defendant claims we were carrying ourselves.

The Court: I understand.

Mr. Weatherford: And we claim it was an inadvertent error and of that \$145,000 they have only paid \$70,000.

The Court: Of course, you could have sued on another theory for the additional \$25,000.

Mr. Weatherford: Yes, we might have, unless we had been estopped by his actually sending the receipt that we overlooked.

The Court: Your theory is that he probably made a mistake.

Mr. Weatherford: That is right.

The Court: Your theory here is that you made the mistake.

Mr. Weatherford: No. Our theory is that Porter made the mistake, and the mistake was made and——

The Court: All right. Your theory is that everybody made mistakes.

Mr. Weatherford: Well, we made the mistake of not seeing and catching Porter's mistake. [29]

(Testimony of Vernon C. Jones.)

The Court: All right.

Mr. Biggs: That is right.

The Court: I still say you could have sued Porter and tried to hold him on the \$25,000 on the telephone call.

Mr. Weatherford: Yes.

The Court: I don't say "hold him." I said "try to hold him."

Mr. Weatherford: I believe that is all the questions I have.

Cross-Examination

By Mr. Buell:

Mr. Buell: I want the record to show the apportionment of that second \$25,000 issued by Porter is \$16,000 to No. 1 and \$8,000 to No. 2.

Mr. Biggs: I think that is all covered by the pre-trial order. I think it is only restating what is in the pre-trial proceedings, and that is precisely what the situation is as to that insurance, your Honor. Prior to that telephone call that the witness made in August, 1946, there was a policy of \$25,000 on each of the two buildings. He ordered \$25,000 additional on each building. Porter's clerk accepted this as \$25,000 on both buildings. This additional \$25,000 was divided, for some reason about which I have not yet been informed. I don't know whether Mr. Porter could help us with that or not. We have a call in for him now. It was divided, one-third on one building and two-thirds on the other, so that, instead of \$25,000 or-

(Testimony of Vernon C. Jones.)

dered for [30] Building No. 2, only \$8,333 additional insurance was placed on Building No. 2. The specific insurance was but \$33,000 instead of \$50,000 which the Grange Oil Company thought they had. I think those were all stipulated facts.

Q. Miss Gilder and Mrs. Roach and Mrs. Miller did all the work in the office, is that right?

A. Yes.

Q. They did not work out in the seed-cleaning part of the business?

A. Mrs. Roach, during the busy season, sometimes. The other two worked in the office.

Q. Did Miss Gilder have general charge of the office work? A. That is right.

Q. Was she your bookkeeper also?

A. She was the head bookkeeper for the company.

Q. In so far as the running of the office was concerned, during the busy period, you relied on Miss Gilder and on the reports that she gave you to sign? A. Yes.

Q. Do you have any record of when you received the endorsement or rider from Mr. Porter's office as a result of your ordering of additional insurance in August?

A. I couldn't say that I could give you the exact date; some time in August.

Q. In other words, the rider got there some time in August? A. What is that? [31]

Q. The rider or endorsement came into your office some time in August?

(Testimony of Vernon C. Jones.)

A. I couldn't say the date it came in.

Q. You think the insurance policies themselves were kept in the bank? A. That is right.

Q. In the vault? A. That is right.

Q. I believe you also testified as the endorsements came in they would eventually be taken down to the bank? A. Yes.

Q. And affixed to the appropriate policy?

A. Yes.

Q. When you went to the vault after the loss to pick up the policies issued by the Sun and Home companies, was the last endorsement attached to those policies?

A. I don't remember.

Q. When you went to the vault to pick up those policies, didn't you check to see how much insurance there was? A. I did.

Q. You found that there was only \$25,000 and \$8,333 in there? A. Yes.

Q. So the endorsement was on the policy at the time?

A. It must have been. The policies were in a box. I wouldn't say they were on the policies, attached to them. [32]

Q. But they were in the vault? A. Yes.

Q. Did any particular person take those various endorsements over to the vault?

A. I did.

Q. You did? A. Yes.

Q. You took them all over? A. Yes.

Q. Did Miss Gilder ever take any over?

(Testimony of Vernon C. Jones.)

A. No.

Q. Do you still have those policies in your possession?

A. We don't. We returned them.

Q. Returned them to the Sun and Home?

A. Yes.

The Court: I thought he didn't have anything to do with the insurance or putting endorsements on the policies. Didn't he just say so? He took them over to the bank.

Mr. Buell: He did, yes, your Honor.

The Court: Do you get the point?

Mr. Biggs: I do. I wonder if the witness has made an error.

A. Any mail that comes in—any policies that come——

Mr. Biggs: That is not the point of the Court's remarks. Did you say a moment ago that Miss Gilder took care of the [33] insurance and took the insurance riders down to the vault?

A. No.

Mr. Biggs: Pardon.

A. My intentions were not that way.

Mr. Biggs: Did you make that statement?

A. I didn't make the statement because my intentions are that I opened the mail on the desk, and she gets the information off her books, usually, and she took care of the bank deposits for us; it was personal bank books. It didn't belong to the company.

The Court: In other words, he had this endorse-

(Testimony of Vernon C. Jones.)

ment at one time and took it over to the bank.

Mr. Biggs: That is correct.

The Court: But she made some entry someplace.

Mr. Biggs: Tell the Court what Miss Gilder did with respect to the entries on the records of the defendant.

A. She reported to The Mill Mutuals that we had \$50,000.

Mr. Biggs: From what information? From what source did she get the information to enable her to make the entries and the report? I thought we could save some time here, your Honor.

The Court: Let him continue with his examination.

Mr. Biggs: All right.

Q. (By Mr. Buell): Then we have gotten this far, that some time between August and prior to January 19th you took the endorsements that were issued by the Sun and Home to the bank and put them in the bank box? [34] A. Yes.

Mr. Biggs: Answer aloud. It is hard for the Court to understand.

A. That is right.

Mr. Biggs: And it is hard for the lawyer's to understand, if you do not speak up.

A. Yes. Pardon me.

Q. (By Mr. Buell): Do you recall when you took that particular endorsement over?

A. No.

(Testimony of Vernon C. Jones.)

Q. You said that you personally opened the company's mail as it came into the office?

A. That is right.

Q. That was every day? A. Every day.

Q. And you read the mail before turning it over to Miss Gilder? Is that right?

A. Yes, my mail.

Q. From time to time, as you received these various endorsements for your different fire insurance policies, through the mail, what did you do with them; that is, the day that they came into the office?

A. Usually turned them over to Miss Gilder to record; usually was a statement with the premium on it and she wrote the checks out for those. [35]

Q. Then would she give them back to you to take over to the bank? A. Yes.

Q. Did you make a practice of keeping a journal or a ledger showing the amount of insurance that you had in effect at any particular time?

A. We did have.

Q. What sort of a ledger did you keep there? During that time, I mean?

A. You will have to ask the bookkeeper. I am not a bookkeeper. What type of a ledger it was I wouldn't know.

Q. Do you ever examine the ledger?

A. Occasionally.

Q. After this loss did you examine the books of your company to determine when this policy

(Testimony of Vernon C. Jones.)

or endorsements of the Sun and Home were posted in your books?

A. I examined a copy of the report to The Mill Mutuals.

Q. Did you keep copies of the monthly reports of values that you sent to the Michigan Millers Mutual? A. Yes.

Q. Referring to the reports of actual cash values, did your office keep carbon copies of those reports?

A. I believe we did. I am pretty sure we did.

Mr. Buell: I have no further questions. [36]

Redirect Examination

By Mr. Weatherford:

Q. Concerning the insurance, the handling of insurance, who prepared the data for your valuations? A. Miss Gilder?

Q. Miss Gilder? A. Yes.

Q. Is that what you had in mind a while ago?

A. That is right. That is what I had in mind.

Q. With reference to the policy itself, you handled that?

A. Well, yes, I took care of the policies, that is right; took them to the bank vault and put them away.

Q. Do you know of any reason, when you got these endorsements, why you did not notice them if they were less than the \$25,000?

A. I don't know no reason why I overlooked it.

Q. But did you, as a matter of fact, know that it was not \$25,000 as you had ordered?

(Testimony of Vernon C. Jones.)

A. No, I didn't know but what it was \$25,000—\$50,000, it would have been; \$25,000 and \$25,000,—That is what I thought it was, and we entered it in the books that way, reported to The Mills Mutual that way and continued to report.

Q. At that time were you busy with the operation of your mill? A. Yes.

Q. What is the fact about any endorsements from the insurance companies? Did you pay any particular attention to them after [37] they came?

A. Just a rubber-stamp manager, is all.

Q. What?

A. The manager is just a rubber stamp. He can't attend to all details of everything.

Mr. Weatherford: I believe that is all.

Recross-Examination

By Mr. Buell:

Q. You knew that these reports of actual cash values were the basis upon which the defendant computed the premium that they arranged on the policies that they had issued to your company?

A. I did not.

Q. Did you ever read through these reports that you made?

A. I don't suppose I ever did.

Q. Do you recall ever reading this statement: "We understand that if the average of the values entered in this statement is less than the average of actual cash values for the same days for which this statement is filed, the difference, in case of loss, shall be deducted from the actual cash value

(Testimony of Vernon C. Jones.)

at the time of such loss, and the remainder (after deducting non-provisional insurance, if any) shall constitute the actual amount of insurance in force under all policies covering under the provisional form.”

You do not recall ever reading that?

A. I do not.

Q. You did, however, know you were supposed to report the [38] amount of specific insurance which you had on the various risks?

A. I don't understand that question.

Q. Did you know in this report you were reporting the amount of non-provisional insurance or specific insurance that you had on your various warehouses, No. 1 and No. 2, and the others you have described?

A. Yes, we realized that it was—that the report covered that.

Q. Do you recall ever reading the red print in large letters in the lower left-hand corner of the report that states “Under-reporting means under-insurance”?

A. I don't remember of reading it.

The Court: This was not a case of under-reporting or over-reporting.

Mr. Buell: Over-reporting of the specific insurance in effect and under-reporting of the values covered by the provisional policy. I have no further questions.

(Testimony of Vernon C. Jones.)

Redirect Examination

By Mr. Weatherford:

Q. Throughout your lifetime have you had—
Before you got into this kind of work, had you
ever had anything to do with provisional insur-
ance?

A. Yes. We had it with the flax plant. We op-
erated the Monroe-Benton County flax plant, and
it was covered by six or seven policies. [39]

Q. And you made these same kinds of reports?

A. That is right.

Mr. Weatherford: That is all.

(Witness excused.)

FLORENCE E. GILDER

was thereupon produced as a witness on behalf of
Plaintiff and, being first duly sworn, was exam-
ined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. State your name in full for the record.

A. Florence E. Gilder.

Q. That is Miss Gilder, is it? A. Yes.

Q. Where do you live, Miss Gilder?

A. Corvallis.

Q. How long have you lived in Corvallis?

A. About twelve years.

Q. What is your occupation?

A. Bookkeeper.

Q. I am sorry. I didn't hear.

(Testimony of Florence E. Gilder.)

A. Bookkeeper.

Q. By whom are you employed, Miss Gilder?

A. At the present time?

Q. Yes. A. The Grange Oil.

Q. How long have you been employed by the Grange Oil? A. Since January 1, 1946.

Q. Prior to that time by whom were you employed?

A. Benton County Flax Growers Association.

Q. Is that the predecessor-in-interest to the Grange Oil? A. No.

Q. Or an associate or affiliate of any kind?

A. No.

Q. What were your duties as bookkeeper at the Grange Oil?

A. At the present time I am taking care of——

Q. I am speaking more particularly of the time involved in this lawsuit, from January 1, 1946, around to January 25, 1947.

A. I took care of their accounts receivable, inventories, reporting the insurance and all customary books.

Q. Speak louder.

A. The general ledger.

Q. The general ledgers?

A. That is right.

Q. When you went to work there January 1, 1946, what did they have, if you can recall, in the way of any insurance record or ledger?

A. They didn't have very much of any kind of a record. [41]

(Testimony of Florence E. Gilder.)

Q. Did they have any record of the insurance that was then in effect, if you recall?

A. No, they didn't have.

Q. Did you make a record, a comprehensive record, as bookkeeper, of the policies of insurance in effect?

A. Well, I had my own little schedule.

Q. What did that schedule consist of? Tell us what that schedule was.

A. Well——

Mr. Buell: Just a minute. Wouldn't the schedule itself be the best evidence?

Mr. Biggs: I am trying to find out. I am learning about this case as it goes along. I don't know what the record was, but I think the Court asked if there was an insurance record of any kind.

A. There was a ledger, my own little schedule, rather, so I could prorate my expenses for the month.

Q. Was there in existence, at the time you went to work for Grange Oil, or at any time from January 1, 1946, around to January 25, 1947, the date of the fire, an office record of the complete insurance status of the company?

A. There wasn't.

Q. I mean by that a record of the policy number, the insurer, the face amount, the premium due, or anything of that kind?

A. There was not. [42]

Q. Is there now such a record in existence, to your knowledge?

A. Well, I don't know. There may be. I might

(Testimony of Florence E. Gilder.)

be able to find it, but it was not in any book or ledger; it was only on——

Q. Have you since then, at any time, even to date, maintained such a record down there?

A. No, we don't.

Q. You do not have that kind of a record?

A. No.

Q. Your responsibility in connection with insurance, you stated, was to make reports of the specific insurance and to pay the premiums as they were billed to you, is that right?

A. That is right.

Q. Do you remember the data included in these reports which counsel has referred to, and marked Pre-Trial Exhibits 18, 19 and 20, and so forth, which records I am now handing you? State whether or not you prepared those, Miss Gilder?

A. I did.

Q. From what source did you get the information that you put into those reports? That is what I am trying to find out.

A. Well, they would bring the grain and seeds in every day; they were cleaned; they would have to clean the seed and we would ship——

Q. You are speaking now more of the value of the stock?

A. That is what I was trying to get at, to figure the value of the insurance. [43]

Q. I can understand that the value of the stock would be of importance, but I do not imagine the Court is interested in that. I was speaking about

(Testimony of Florence E. Gilder.)

insurance, specific insurance reported in the last few months by those reports. A. Yes.

Q. Where did you get that information, Miss Gilder?

A. From Mr. Jones. It was understood between us that \$50,000 would cover our specific insurance.

Q. Do you recall ever having seen a specific rider or endorsement on these policies and making a record of that for the purpose of your report?

A. No, I didn't see them.

Q. Do you recall the placing of the insurance or any of the circumstances attendant upon it?

A. No, I don't.

Q. Do you recall the telephone conversation that has been testified to?

A. Well, yes, I heard several telephone conversations regarding insurance.

Q. In other words, you don't remember this particular telephone conversation? You have no independent recollection of it?

A. I can't swear that I remember this particular one, but I heard several of them.

Q. But do you recall when you learned and how you learned that the coverage was \$50,000 on this Plant No. 2? [44]

A. Well, I took care of the values in the insurance and Mr. Jones and I usually discussed things, and it was our intention to cover it for \$50,000. We understood that is the way it was covered.

(Testimony of Florence E. Gilder.)

Q. You do know that you were told and understood that the amount was \$50,000? A. Yes.

Q. And you did fill that amount in on your report, did you? A. That is right.

Q. When did you first discover that was in error?

A. I didn't discover it until after the fire and we were working on the adjustment, and Mr. Sankela was down. After it was all figured and our adjustment came to the same conclusion, he reminded me of the fact that we were not covered for \$50,000.

Q. You say that he reminded you of the fact. What did he do, if you recall? What did he tell you?

A. I don't recall—I don't know that I exactly recall the words, but that we were not fully covered up to the \$50,000, and he didn't know just exactly what his company would do. He said we might have to pay a little more premium to cover it, but he——

Q. Was that the first information you had that the amount of your specific insurance on this building was under \$50,000? A. That is right.

Q. How long had Mr. Sankela been down there making this adjustment [45] before that information was developed?

A. I think we worked all one day there.

Q. Nothing had been said about specific insurance until after the agreement was reached on the value of the inventory?

(Testimony of Florence E. Gilder.)

A. That is right.

Q. Is that correct?

A. The value of the inventory and plant, that is right.

Q. Then did you subsequently see the endorsement, after the policies had been obtained, after the adjustment and after Mr. Jones had gone down and got the policies? Do you remember then of having seen them?

A. No, because I think he took them right away. I didn't see them.

Q. You did not see them? A. No.

Q. When you paid the premiums as they were billed to you, was there any statement of the exact amount of insurance or the premiums, as these statements came to you?

A. Well, usually there was the insurance number and the amount, and the amount of premiums but not the rate or which building the insurance applied to. That was never stated on an invoice.

Q. You simply paid them the amount for which they were billed? A. That is right.

Q. And no question was ever raised by you as to the amount of the premium? [46]

A. No, because I couldn't figure the insurance. I didn't know whether they were—I didn't know whether we were paying too much or too little.

Q. But you learned for the first time from Mr. Sankela that your specific insurance was not \$50,000. Did he tell you from whom he had learned that the insurance was not for \$50,000?

(Testimony of Florence E. Gilder.)

A. No, he didn't.

Q. You didn't know about that, or what source that came from? A. No.

Mr. Biggs: I think you may cross-examine.

Cross-Examination

By Mr. Buell:

Q. You said you did not know of this error on the part of Mr. Porter in issuing that new insurance policy until after the loss?

A. That is right.

Q. Do you not recall making any notation on any schedule or any journal entry or ledger entry or any entry on this schedule you are referring to of the fact that you had \$33,000 specific insurance on Building No. 2? A. No.

Q. You did not have any records as to which insurance was on which building with each different company? A. No.

Q. Did you have that tabulated anywhere in your records? [47]

A. Just my own little schedule so I could report it to The Mill Mutuals, the value in each of these buildings.

Q. What did you have noted on the schedule as to the specific insurance on Building No. 2?

A. That was \$145,000.

Q. And the specific insurance in the Sun and the Home?

A. I figured it was \$50,000.

Q. You had \$50,000 entered in your schedule?

A. Yes; and the reason I did that was to break

(Testimony of Florence E. Gilder.)

down the expense so I could charge the correct expense each month when I had to make my financial report.

Q. That schedule, then, was just made up from what you understood the company had in the line of insurance and did not result from your making accurate entires every time a new policy or endorsement came into the office?

A. That is right. I waited for the invoice.

The Court: This being co-operative, that breakdown is apportioned among the growers, is that the idea?

A. The expense, yes, that is right. It would have to be. The grower was charged for his amount of insurance.

Q. (Mr. Buell): That was the reason you kept that schedule, so you could apportion it?

A. So we would have a breakdown on it, yes. As far as the premium itself was concerned, that was charged to my prepaid expense, in my general ledger. [48]

Q. You prepared the reports of cash values that were sent by Grange Oil Company to The Mill Mutuals? A. Yes.

Q. And submitted them to Mr. Jones for his signature?

A. For his signature, that is right.

Q. Did you keep a copy of these reports in your records? A. Yes. I have all the reports.

Q. Are those here in court?

A. I am afraid they are not. I doubt very much if Mr. Weatherford ever had them.

(Testimony of Florence E. Gilder.)

Q. Is this schedule you referred to in court?

A. No. I didn't think it was necessary because I thought it was more for my own information than anything else.

Q. Do you know what period of time was covered by the insurance policies issued by the Sun and Home companies, how long they were to run?

A. I expect a year, unless they were canceled in the meantime.

Mr. Buell: That is all.

Redirect Examination

By Mr. Biggs:

Q. As I understood your testimony, your schedules were made for keeping track of the expense, more for keeping track of the expense of the insurance than the amount of insurance, is that correct? A. That is right. [49]

Q. That was so the expense could be apportioned among the growers? A. That is right.

Mr. Biggs: That is all.

(Witness excused.)

Mr. Biggs: That is all the witnesses we have available, if the Court please. We had a call in to Corvallis for Mr. Porter, but he has not called back yet. It may be we will have some additional evidence that we would like to submit to your Honor, but at this time that is all the testimony.

The Court: Do you have witnesses, Mr. Buell?

Mr. Buell: Yes, we have, your Honor.

The Court: How many?

Mr. Buell: Just one.

The Court: You had better put him on.

Mr. Buell: At this time, your Honor, I would like to have marked as Exhibit No. 27 reports of actual cash values rendered by the plaintiff to the defendant for the months of January, 1947, December, 1946, February, March and April, 1947, which were received by the defendant, as indicated.

The Court: Put all of your pre-trial exhibits in.

Mr. Buell: That was not marked as a pre-trial exhibit.

At this time the defendant offers in evidence Defendant's Pre-trial Exhibits No. 17 to No. 27, inclusive, as Defendant's [50] Exhibits.

The Court: They are admitted subject to any specific objection that may be stated at any time during the trial.

DEFENDANT'S EXHIBITS:

(Defendant's Pre-Trial Exhibits were thereupon received in evidence as Trial Exhibits as follows:)

17. Resolution of Plaintiff, dated May 28, 1947, embodying agreement between Plaintiff and Defendant as to payment and acceptance of undisputed portion of the loss.

18. Report of actual cash values made by Plaintiff for the month of May, 1946.

19. First report of actual cash values made by Plaintiff for the month of June, 1946.

20. Corrected report of cash values made by Plaintiff for the month of June, 1946.

21. Report of actual cash values made by Plaintiff for the month of July, 1946.

22. Reports of cash values made by Plaintiff for the months of August, September, October and November, 1946.

23. Work Sheet of Defendant, used in computing earned premium for the policy year May 1, 1946, to May [51] 1, 1947.

24. Provisional ledger sheet of Defendant, showing posted average values for the stock in Building No. 2 for the policy year.

25. Copy of letter of Defendant to Plaintiff dated July 10, 1946.

26. Copy of letter of Defendant to Plaintiff dated November 4, 1946.

27. Reports of actual cash values rendered by Plaintiff to Defendant for December, 1946, and January, February, March and April, 1947. [52]

Defendant's testimony:

NEIL J. SANKELA

was thereupon produced as a witness on behalf of defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Buell:

Q. Your name is Neil J. Sankela?

A. That is right.

Q. What relation do you have to the defendant, Michigan Millers Mutual Fire Insurance Company?

A. Well, I am employed by The Mill Mutuals

(Testimony of Neil J. Sankela.)

in Seattle, and the Michigan Millers is one of the companies that is a member of The Mill Mutuals group.

Q. How many companies are in The Mill Mutuals group? A. There are ten.

Q. The defendant is a Michigan corporation, is that right? A. That is right.

Q. What is your capacity or title?

A. Assistant Manager.

Q. Assistant Manager of the Seattle office, is that right? A. Right.

Q. How long have you been in the insurance business?

A. Well, I have been with The Mill Mutuals since 1923—twenty-five years now.

Q. What type of insurance does The Mill Mutuals handle or write? [53]

A. Well, in our Seattle office, which is known as the Pacific Department, we are known as the mill and elevator department and handle only grain storage and processing, grain processing with some seed cleaning plants.

Q. In other words, a specialized type of insurance? A. That is right.

Q. The policy which was issued to the Grange Oil Company is known by the company as a Provisional Stock Policy. Would you state what kind of a policy that is?

A. Well, we refer to it as a provisional adjustment form of policy. It is a policy that is designed by our companies, at least, principally for grain

(Testimony of Neil J. Sankela.)

dealers, and others, to protect fluctuating values of grain as it comes in the elevator, starting in the harvest season, when it might run up to high values in a month or six weeks, and this provisional adjustment form of policy was brought about, I imagine, about twenty-five years ago and is now in very wide use, particularly in the grain trade.

Q. Is it used or is a similar type of policy used also by stock companies as well as mutuals?

A. Oh, yes. They have a provisional form of policy.

Q. What was the hardship or the difficulty, rather, which the grain and seed elevator and warehouse businesses were encountering which brought forth the development of this provisional type policy?

A. Well, they were attempting to cover fluctuating values with [54] what we call specific policies or certificates, which resulted in many policies and required a daily check during the receiving season of the amount of their policies and also required a daily check during the shipping season to see whether they had adequate coverage. It required the ordering of insurance almost daily during the receiving season and almost daily cancellations during the shipping season.

Q. The rates for a provisional policy on a particular risk, such as the risk in this case, how do they compare with the rates for specific or non-provisional insurance on the same risk?

(Testimony of Neil J. Sankela.)

A. Well, in this particular case it was a combustible type of building involved here. If we had a specific policy with the same co-insurance conditions that are on the provisional, the specific insurance would be less by about 10 per cent. The rate under the specific would be cheaper than under the provisional by about 10 per cent.

Q. How is the difference in the rate compensated, under the provisional type policy?

A. Well, under the provisional type policy, the amount of insurance fluctuates with the values, depending on the values reported. In other words, if reports of values are made accurately, the insurance follows those fluctuations, up or down as the case may be, so that they are never underinsured or never overinsured, if those values are reported accurately.

Q. On the first page of the policy which has been introduced by [55] the plaintiff, and which was issued by the defendant, it refers to a provisional amount or a provisional premium. Would you briefly tell the Court what that provisional amount or provisional premium is?

A. Of course, in the provisional policy we never know until the end of the year what the actual insurance liability is, or when the policy is issued, for that matter. In order that a premium might be collected, we have just taken 25 per cent of the limit mentioned in the policy and based the provisional premium on that 25 per cent of the limit. That is just to collect the premium at the time

(Testimony of Neil J. Sankela.)

of the issuance of the policy to comply with the state law.

Q. In Paragraph 3 of the standard stock form policy, which was issued to the plaintiff, the insured is required to make certain reports to the company. Would you tell the Court what the company does with the reports when they are received?

A. As reports or declarations of value come in each month, they are immediately given to the book-keeping department where the values are posted on what we call the provisional ledger. We have a general ledger sheet for each policy and if there is more than one location, if there is more than one location involved in the policy we have a provisional ledger sheet for each location.

Q. That would be, for each separate risk?

A. That is right.

Q. Listed under the schedules of the policy?

A. That is right, because they probably have different rates, and then the premium on each location is figured individually, and these values are entered on these provisional ledger sheets.

Q. Those values as reported are the values for each of the weeks of the month for which the report is made? A. That is right.

Q. Does your bookkeeping department keep any record or post the amount of specific insurance as such reported by the various insured?

A. No.

Q. Into any ledger or other account?

A. No, we have no record of that except unless we place the specific insurance ourselves and have

(Testimony of Neil J. Sankela.)

an authentic record of it. Where the insured has placed it himself, we have no other record than is disclosed on these declarations of value reported each month.

Q. Does the company do anything with regard to the amount reported in every case, other than to deduct it from the average value that you have just testified about?

A. That is all we do with it.

Q. Would you tell the Court whether or not reports of insurance values go through any underwriting departments?

A. Yes, they are referred to the underwriters' department for if the insurance has a reported value in excess of the limit— That quite frequently occurs, and they will have to immediately [57] get in touch with the policyholder as to whether he wants his limit increased; in other words, ask for instructions.

Q. If it appeared from the report that the insured was carrying more specific insurance than his actual values, would that fact come to the attention of the underwriting department?

A. Yes, it might, but not just for one month. We might not call the underwriting department's attention to it, but if it went on for several months, they might say, "See here, this insured has specific insurance. He really does not need to report the policy because he has reported no values under it, as far as provisional insurance is concerned."

Q. In a case such as that, if the non-provisional

(Testimony of Neil J. Sankela.)

insurance exceeds the amount of the values of the stock, is there a premium earned for that month under the provisional policy?

A. Absolutely none.

Q. Yet, under those conditions, although no premium was earned, if a loss occurred and the report had been accurate, would the company be liable under the provisional policy?

A. If a fire occurred after that report, or the month in which the report was made, and the report was in our files, although we had not earned a premium on the previous month, due to the fact that the specific insurance exceeded the insured value, if the values had increased in the interim during the current month in which the fire occurred and the values had exceeded the specific insurance, the amount of cost would be covered under the provisional [58] adjustment policy. That is an administrative feature with this policy.

Q. Are the reports of cash values rendered by the insured under this type of policy similar to—not similar but comparable to applications for new insurance or specific insurance?

A. Well, we almost regard them as a monthly order for insurance. In fact, sometimes they will include a location on this monthly report which is not covered under the policy. Then that requires us to get in touch with the insured as to what his desire is in connection with the newly reported location.

(Testimony of Neil J. Sankela.)

Q. Could you tell the Court approximately the premium volume of The Mutual Mills in the State of Oregon?

A. Oh, I don't know exactly. I would guess it is \$140,000 or \$150,000 annually.

Q. How many representatives do The Mutual Mills have in Oregon? A. They have one.

Q. His name is Mr. Hefler?

A. That is right.

Q. Is Mr. Hefler a salaried employee?

A. He is a salaried employee.

Q. What are his duties?

A. His duties are to make surveys for physical hazards and make re-inspections to discover fire hazards, and he does negotiate some insurance, but I would say 90 per cent of his time is involved in making inspections and surveys. [59]

Q. Determining the risks?

A. That is right, physical characteristics and so on.

Q. Does your company employ any auditors to inspect the books and records of accounts of your various insured clients?

A. No; only sometimes we might make a special case, in the case of a fire loss, where we would want an audit; that is the only time.

Q. Aside from any question of a fire loss, in the computing of the premium earned under the provisional policy, does The Mill Mutuals ever audit the books of the insured under the various policies? A. No, sir.

(Testimony of Neil J. Sankela.)

Q. Do they ever require the insured under these various policies to produce any specific insurance policies carried, produce them for examinations?

A. I don't recall that we ever actually have. We usually depend on the report.

Q. Mr. Sankela, it was brought out during the plaintiff's case that you had assisted in adjusting this loss. Would you tell the Court when you first learned of the actual amount of specific insurance carried in the Sun and Home Insurance Companies on this Building No. 2?

A. This loss occurred January 9th, and I believe I was in Monroe, on about January 10th, and when I arrived there I met Mr. W. J. Moe, fire insurance adjuster for the Fire Companies Adjustment [60] Bureau, as it is called or was called at that time, and he represented the Home and Sun policies.

I think I casually remarked to him that, according to the reports in our files, there was \$50,000 specific insurance involved in this fire, and he said, "No, I believe you are wrong. There is only \$33,000 odd," and then in Mr. Jones' office I believe he gave me the details of the two policies he represented, and I said, "I am just wondering if there is another policy somewhere," and he said, "I doubt it. I have wired all the insurance offices."

Q. Had you known of or ever received any information or knowledge prior to that time as to the actual amount of the specific insurance?

A. No. In fact, when I left Seattle to come

(Testimony of Neil J. Sankela.)

down I figured their loss was the amount that they had on hand less \$50,000.

Q. In Paragraph 6 of this policy, the standard provisional stock form, including the various endorsements of the policy, there is a reference made to "percentage of insurance under this policy," and in this particular case that percentage of insurance is referred to as 100 per cent.

Would you tell the Court as to what instances that percentage would be specified any less than 100 percent?

A. If the risk is larger than one company can carry, it may be spread out among two or more. If three companies, for instance, carried that risk, that 100 per cent would be changed to 33⅓. It means it is the per cent of the liability under that form of [61] insurance. Sometimes there may be fifteen companies on a risk, providing the necessary amount of coverage, and each takes its own specific percentage.

Q. Upon what basis was the premium which was charged the plaintiff when this policy was canceled in May, 1947, calculated?

A. Well, it was calculated — based on their reports at the unburned location, following the reported values up until the time of the cancellation. The amount of loss paid was figured at the rates applicable for the unexpired portion or the period of time set under the policy, which is in accordance with the policy form.

Q. Did the company charge any premium for

(Testimony of Neil J. Sankela.)

the specific insurance which was reported by the plaintiff? A. No.

Q. Has the company ever allowed an adjustment of any loss under the provisional policy, such as the one issued to the plaintiff—allowed the insured to correct the report, the previously filed report, after the loss has occurred?

A. Never to my knowledge.

Q. Have there been instances in which the insured have tried to have such loss reported?

A. Yes, had one just less than a year ago.

Q. I show you a document marked Plaintiff's Exhibit No. 16, introduced by the plaintiff, and will ask you to examine the figures on that instrument. Are you familiar with those figures? [62]

A. Yes, sir.

Q. What do they represent?

A. This represents a computation of the insurance supplied under a provisional policy as of January 9, 1947, the date of the fire, and apportionment of the loss among the various policies involved.

Q. Was that prepared by yourself?

A. Yes, sir.

Q. Was that forwarded to the plaintiff?

A. It was.

Q. Was it sent to the plaintiff accompanied by another document?

A. Yes, it accompanied a proof of loss.

Q. In making that computation of the amount of insurance in effect, were you guided by Para-

(Testimony of Neil J. Sankela.)

graph 5 of the standard provisional stock form?

A. Yes, I followed the steps as provided in Paragraph 5 of that form.

Q. Section 5-A, which refers to the value of the stock in Building No. 2, January 9, 1947, is that in dispute?

Mr. Biggs: That is right.

Mr. Buell: The sum of \$33,333, specified in Section 5-B was the actual amount of insurance in the Sun and Home companies.

Mr. Biggs: That is correct.

Mr. Buell: Q. Would you explain to the Court how you calculated—or, first of all, would you tell the Court what Section [63] 5-C has reference to?

A. The whole paragraph provides the steps to be taken, if the insurance under this provisional policy is to be determined at any one time. Of course, most of the times when you determine the amount of insurance, it is at the time of a loss. You find out how much insurance there is and what form, because it fluctuates throughout its lifetime. Under Paragraph 5-C we refer to it as a penalty and honesty clause.

Mr. Biggs: I think, strictly speaking, that is not competent, as it calls for the opinion of the witness. However, if it is of any help to the Court, we do not care. We want to get at what the facts are.

Mr. Buell: Q. Go ahead and state how you calculate that?

A. That clause provides in case the full value required by the policy was not reported, it provides

(Testimony of Neil J. Sankela.)

for a penalty, provides for the deduction of the amount unreported from the value of the stock on hand at the time of the fire and under Section 5-C that was done, under which the liability assumed by the provisional policy was the amount of the value reported and the specific insurance deducted; the amount of specific reported was deducted, so the provisional policy in this case took on a liability of \$103,593.49, that being the actual average value reported for November, \$153,593.49 less the \$50,000 covering non-provisional insurance reported, making \$103,593.49. After the fire, we actually discovered that there was only \$33,333 of specific [64] insurance actually in force. There was an understating of values by \$16,667, and, in accordance with Paragraph 5-C, that amount was deducted to arrive at the insurance under the provisional policy.

Q. What amount of insurance did this formula which you used show to be in effect at the time of the loss?

A. It showed the insurance under the provisional policy, January 9, 1947, to be \$71,410.31.

Q. Could that figure as to the amount of insurance in effect have been arrived at in any other manner?

A. Oh, we could just have taken their word for it and deducted \$50,000 of non-provisional insurance and had the same result. It still showed \$71,410.31 insurance under the provisional reported as of January 9, 1947.

(Testimony of Neil J. Sankela.)

Q. That would be under Section 5-B?

A. That is right.

Q. When this policy was canceled out, at the end of the policy year, how was the earned premium calculated?

A. Well, it was based on the reports of values, as previously stated, on the unburned location on the last settlement date to—from the last settlement date to the date of cancellation, and on the burned location on the amount that was paid on the claim from the date of the fire to the end of the policy year.

Q. Handing you Defendant's Exhibit No. 23, I will ask you if you can identify it? [65]

A. This is a work sheet as prepared by our bookkeeper in connection with computing the earned premium on the policy in question.

Q. That was computed in the regular course of your business? A. That is right.

Q. Referring to the first column on the left side of the page marked "Location," what is listed under that column?

A. Well, the first one is the elevator and feed mill No. 1, at Monroe, Oregon, and elevator and feed mill at Varions, Oregon; then Monroe, Oregon, warehouse and seed cleaning plant No. 2.

Q. Those are different risks insured under this policy?

A. Yes. There are two more, the flax warehouse at Monroe and hay and straw storage at Varions.

Q. There appears to be a break in the time breakdown, for instance, from May 1, 1946, to

(Testimony of Neil J. Sankela.)

August 19, 1946, and there appears to be another schedule for the period of time from August 19, 1946, to May 1, 1947. Can you state the reason for that difference of breakdown there?

A. Well, Location No. 2, as far as this policy was concerned, was eliminated. Excuse me. Location No. 2, the breakdown from 8/19/46 to January 9, 1947—As of August 19, 1947, the form of the policy was changed as to coverage, making it specific instead of blanket.

Q. In other words, prior to August 19th, the policy did not attempt to set out the different buildings in which insurable goods were stored?

A. That is right.

Q. The second column marked "Total," what do the figures in there represent?

A. Pertaining to Plant No. 2—

Q. Just in general, what do they represent? What are they predicated upon?

A. They represent the total values as disclosed by the reports in that particular period.

Q. These reports of value that have been introduced in evidence in this case?

A. That is right.

Q. The next column marked "Weeks"—

A. That shows the number of weeks that the amount of insurance was in force at a certain date.

Q. And then the fourth column, "Average"?

A. That is the average of values in force for the period in question, the average liability that was assumed by the provisional policy.

(Testimony of Neil J. Sankela.)

Q. And the fifth column, "Rate"?

A. That is the rate that applied to the particular location.

Q. The column marked "AP," what does that stand for?

A. That is the premium which would have been earned on \$1,000 if the average amount of insurance had been in force for twelve months.

Q. And the column marked "EP"? [67]

A. That is the actual earned premium for that portion of the year whenever the insurance was in force. For instance, on this plant at Monroe, that insurance was in force for 20 weeks, so that figure under "EP" is the premium earned for that period.

Q. That would be 20/52nds of the annual premium indicated in the next to the last column, 20/52nds? A. That is right.

Q. Does this exhibit, No. 23, accurately report the premium earned under this policy for the year May 1, 1946, to May 1, 1947?

A. I believe it does.

Q. The average values posted to the provisional ledger sheets for each of the risks involved and covered under this policy were posted on the basis of the information as to non-provisional insurance reported to your company by the plaintiff, is that right? A. That is right.

Mr. Buell: No further questions.

(Testimony of Neil J. Sankela.)

Cross Examination

By Mr. Biggs:

Q. As I understand it, the whole purpose of a policy of this kind is to protect the insured over and above the actual insurance he already has? That is the general purpose of it?

A. It is to cover fluctuating values; that was the primary purpose of the policy.

Q. Specific policies were too rigid in their limitation and it was thought it would be cheaper for them to carry partial protection [68] with specific insurance and then carry non-provisional insurance that would take care of fluctuating values?

A. Some people might think that way, but we replace specific insurance with provisional policies.

Q. Completely? A. In most cases, yes.

Q. You spoke of this as being a provisional standard form of insurance. What is standard about it? Do you know of any state that adopted this form? Are there any other companies in the United States writing this kind of insurance, using expressly this form?

A. No; this form is peculiar to our company. I don't know why that word "standard" is in there.

Q. I have not found a policy that has got the same wording. You don't know why that "standard" is in there, what that "standard" means?

A. I don't know why it is in there.

Q. In your breakdown and in your method of computing, in accordance with the formula you

(Testimony of Neil J. Sankela.)

read the word "value" to include not only stock values but the amount of specific insurance, did you not?

A. That is taken into consideration, yes.

Q. Actually, that is how you have considered the word "values" in that form, as including both stock values as well as reported specific insurance?

A. Yes, and in determining the amount of liability assumed by the provisional carrier.

Q. This policy actually contains a specific definition of the word "values," does it not?

A. I believe it does.

Q. To mean only the value of stock without any reference to the amount of non-provisional insurance?

A. It has a definition of "value" in order to determine how goods are to be shipped, how they are to be valued—

Q. Actually, your policy says the word "value" wherever used shall be used to mean the value of the stock, does it not?

I call your attention to Paragraph 4 of the endorsement, (4a) — you have the endorsement there, do you?

A. I have one in my pocket, a printed form, a blank form.

Q. Use that, please, if it is the same as the one you have got in the policy.

A. I believe it is.

Q. Yes. The word "value" as used in the form, under Section 4, (4a), (4b) and (4c)—and then

(Testimony of Neil J. Sankela.)

it specifies it to mean such and such, does it not?

A. Right.

Q. Being the value of the stock with reference to the amount of insurance, isn't that correct?

A. That is what it says.

Q. So, in the formula you used in arriving at the non-provisional [70] insurance in effect, and the formula that the plaintiff contends for, the whole difference is that you read the formula to mean the value of reported stock and the amount of reported non-provisional insurance, isn't that right?

A. Well—

Q. If you read these two factors together?

A. The net liability assumed by the provisional carrier on the form was based—

Q. I was speaking of the formula that was employed in accordance with the provisions of the policy. When you computed the final premium due on this policy, you knew perfectly well what the facts were, didn't you?

A. By the end of May when that policy was canceled, the earned premium was figured for the purpose of cancellation. I think we had all agreed as to the amount which the policy was liable for.

Q. I am sorry. My question is: You computed the premium on this policy at the end of the policy year, which was in May; without reference to cancellation, you computed it?

A. Yes.

Q. You computed the premium that would have been due, even if you had not canceled it, at the end of May?

(Testimony of Neil J. Sankela.)

A. That is right, based on the reports.

Q. In May, you knew precisely all of the facts about the amount of specific insurance, all the facts about inventory and everything else, did you not?

A. Well, yes, because we discovered the actual amount of specific insurance in January.

Q. That is what I mean.

A. Yes, that is true.

Q. In dealing with grain processors—I suppose you have other co-operatives besides this particular co-operative? A. Yes.

Q. You are dealing with farmers who are primarily agriculturists rather than insurance experts and businessmen?

A. We do not deal direct with the farmers. We deal with the managers.

Q. In the very nature of the business and the type of risk you undertake, and the type of people you are dealing with, lots of errors must occur in reporting both the value and specific insurance?

A. There are some that do occur, true.

Q. Perfectly honest errors? A. Yes.

Q. Isn't it the policy of the company, by holding up liability for premiums—holding liability for premiums open until the end of the year, to give everyone a chance to clear up errors that might be compensated?

A. No. When it comes to the computing of the premium at the end of the year, those declarations of value are from their own files, their whole story, in computing premiums. [72]

(Testimony of Neil J. Sankela.)

Q. Suppose an honest error were made by reporting values as \$100,000 for a month when actually there were only \$80,000 on hand; suppose they did not have a chance to count accurately every bit of seed, with the result that they reported \$100,000 and, when the fire occurred the next month, the inventory showed only \$80,000. You would be paid off on \$80,000, wouldn't you, if the value remained the same at the time of the fire?

A. Yes.

Q. You mean you would still keep the premium for \$100,000 on the basis of the report that they had made?

A. Yes, unless they filed a corrected report.

Q. So, in many instances, assuming that honest errors are made, it operates to the advantage of the company, and you would simply keep it; whenever an error of that kind would occur, it would operate to the advantage of the company, wouldn't it?

A. Well, unless it is called to our attention, we would not know anything about it.

Q. In computing premiums or going over your books, aren't there any instances where you require an audit or receive audits from your assured at the end of the year, so that a completely accurate basis can be had for determining premiums?

A. If you mean by an audit, to go back and check over twelve months' reports to find out if they report 100 per cent, no, we do not make any audit of that kind.

(Testimony of Neil J. Sankela.)

Q. You do not make any audits of that kind?

A. No.

Q. Are there any underwriters' services that furnish information respecting the amount of over-insurance which an assured has? Isn't there such information available?

A. Not to my knowledge.

Q. You do not report to any central agency, other than your own company?

A. That is right.

Q. You don't do that?

A. Just within our own group. We do not report to anybody else.

Q. Just within your own general company?

A. That is right.

Q. Suppose in this case that the November report was the last report you received—

A. The last report on file prior to the fire.

Q. Supposing that immediately after reporting to you \$50,000 insurance that they actually had in November, that in December, for some reasons known to themselves—sufficient reasons, we will assume—they dropped their insurance to \$33,000, their specific insurance to \$33,000; then the fire occurred in January, before a report was due to you on that change in insurance; the fire occurred before the report came to you of the actual amount of specific insurance—you would not contend then that you were not liable for the additional hazard that you had assumed when the specific insurance had been decreased? [74]

(Testimony of Neil J. Sankela.)

A. I think under the conditions which you stated, if they had complied with the value report clause that the provisional policy would have taken care of that difference.

Q. So, the situation is exactly the same here, except the fact that they did not have \$50,000; mistakenly, they assumed they had more insurance than they did have. Would that put you in any different situation than you are put in in this case? It could have been done without error at all, the same situation—

A. That is one of the advantages, one of the things provided under the provisional form, in that it provides automatic coverage on increased values between reporting dates.

Q. And if a loss occurs between reporting dates, even though there has been a change in the insurance, I am speaking about, you would still go ahead and assume the additional liability?

A. Subject to the other conditions of the policy, of course, subject to the value reporting clause, and subject to the limit and so forth.

Q. Yes. I mean within the limits of \$145,000, you would have accepted in that case an increased premium to cover that additional hazard?

A. Well, the policy would, by its terms, assume any liability between reporting dates.

Q. Could you tell us how much premium is involved here, what the premium would have been if they had reported only \$33,000 [75] specific insurance instead of \$50,000, or would that require a little computation?

(Testimony of Neil J. Sankela.)

A. I have not computed that. I haven't any idea, but it would probably be—\$16,672 would be the difference, so the rate to apply to that—

Q. Could you give us any idea what the amount is?

A. The rate I think was at that time \$1.91—The annual rate would be \$233, roughly. That would be the annual rate. Breaking that down into months, it would be one-twelfth of that.

Q. So the amount of the premium is not very much, is it? A. Apparently not.

Q. The amount of the premium that would be involved here? A. No.

Q. You have never and your company has never submitted to the Grange Oil a statement of the amount of that premium?

A. That would have been earned?

Q. Yes. A. No, I don't believe they have.

Q. Just what is the purpose, if you can enlighten us, of deferring computation of the premium to the end of the year, rather than to make it on a monthly basis?

A. Well, it has just been the policy of our group of companies to make it on an annual basis. I think some companies did render earned premium statements monthly, on a monthly basis, but we never have. [76]

Q. You never have? A. No.

Q. You defer it until, as you say, all the information is available—solely on the basis of reports rendered. You don't do that until the end of the year? A. That is right.

(Testimony of Neil J. Sankela.)

Q. By "contributing insurance" is meant insurance from all companies on the risk, is that correct?

A. They contribute to the payment of the loss, yes.

Q. I am not sure that I understand it correctly—correct me if I am wrong. You said provisional insurance is about 10 per cent higher than non-provisional or specific insurance rates would be on the same risk, with similar policy conditions?

A. Just applying to our own group.

Q. Yes.

A. That does not apply to other companies.

Mr. Biggs: I think that is all, your Honor.

Redirect Examination

By Mr. Buell:

Q. Mr. Sankela, did you state that this provisional insurance policy is to cover changes, fluctuating changes in value between reporting dates?

A. If a man reports, say, \$50,000 for the month of November and then a fire occurs, say, on the 15th of December, and he has \$75,000 of value, he is covered for \$75,000, provided he has [77] complied with the other conditions of the policy.

Q. This case here then is not one where a change occurred between reporting dates?

A. Not as to the provisional insurance or non-provisional insurance. It was the same in November as it was on January 9th. There has been no change.

Mr. Buell: No further questions.

(Witness excused.)

Mr. Biggs: I neglected to state, your Honor, that it is stipulated in the pre-trial order that the amount of attorney's fees may be determined by the Court, with or without expert testimony. Shall we leave it that way? Mr. Weatherford is here, if he wants to produce testimony.

The Court: Just as you wish.

Plaintiff's Testimony as to Attorney's Fees

MARK V. WEATHERFORD

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. Will you state your full name, please.

A. Mark V. Watherford.

Q. Where do you reside, Mr. Weatherford?

A. Albany, Oregon. [78]

Q. What is your occupation?

A. Attorney.

Q. How long have you been admitted to the Bar? A. Since 1910.

Q. That is the Bar of this Court and the Supreme Court of Oregon? A. Yes.

Q. During that time have you been continuously engaged in the practice of the law?

A. Yes, except for about six or seven years during the First World War and following.

Q. What is the general character and nature of your practice? A. General practice.

(Testimony of Mark V. Weatherford.)

Q. Are you associated with any others in the practice of law? A. Yes.

Q. With whom?

A. The law firm of Weatherford & Thompson.

Q. You are the attorney of record in the action brought by the plaintiff here for the plaintiff, the Grange Oil Company of Linn and Benton Counties? A. Yes.

Q. When were you retained?

A. It was after the fire.

Q. Will you relate to the Court briefly what your services have been and what they have consisted of in connection with counseling [79] your client in this case, preparing the case for trial, instituting the action, and the brief work and other work incident to bringing it on for trial?

A. Of course, the usual advice, in the matter; probably half a dozen meetings with all of the board of directors; probably twice that many meetings with the manager; some considerable correspondence with the insurance company and its attorneys.

Q. Is some of that correspondence in evidence here?

A. Yes. There was a monumental amount of material to be examined and legal investigation to be made. This question had not been before the courts and required an unusual amount of legal investigation, without too much results.

Then there was the preparation of the complaint and preparation for trial, pre-trial and trial.

(Testimony of Mark V. Weatherford.)

I assume that, all told, I have spent thirty days on this case to the exclusion of anything else. That is only an estimate, but I think that is pretty close. Then, I have had assistance.

Q. You associated our firm?

A. Yes, and I have had probably four conferences with you, one in Albany, I think two or three in your office, and a number of trips to Portland from Albany.

Q. Had you ever had before any experience with insurance companies, either in maintaining actions against them or defending actions for them?

A. Yes. I can recall one or two cases, one at least, that went to the Supreme Court. I can recall other cases that were filed and settled, but not a great deal of insurance alone.

Q. Mr. Weatherford, considering the amount of work that you have done and that others have done at your request and with your assistance and under your counsel in this case, the amount involved, and the difficulties and complexities of this case, do you have an opinion as to what reasonable attorney's fees should be allowed the plaintiff in this case, if it prevails?

A. Yes, I do have.

Q. Will you state to the Court what that is.

A. For preparation and trial of the case, I would say \$1500.

Q. Did you have some other amount in mind for other services rendered?

A. I don't think that would be enough, to include office work that we did in the settlement

(Testimony of Mark V. Weatherford.)

and so on, but it is my understanding that is not included in the attorney's fees, that other work involved in the settlement.

Mr. Biggs: You may cross-examine.

Mr. Buell: We have no examination, your Honor.

(Witness excused.)

The Court: Any rebuttal?

Mr. Buell: The defendant rests.

Mr. Biggs: We rest, your Honor. [81]

The Court: Do you want to argue the case later, or do you want to do it now?

Mr. Biggs: My suggestion would be, if it is agreeable with you, to continue the argument until after we have filed our briefs. We have got a lot of legal memoranda which is not in proper shape at present, which we wish to present to your Honor. I think in a short time we could get it into a form that would be helpful.

Mr. Buell: I think that would be the advisable procedure, your Honor.

The Court: How much time do you want, keeping in mind that July 4th is going to be here soon.

Mr. Biggs: We understand you want to get this disposed of before the Fourth?

The Court: If possible.

* * * *

Defendant's Objections to Plaintiff's Exhibits

Mr. Buell: The defendant objects to the introduction of Plaintiff's Pre-trial Exhibit No. 14 for the reason that it refers to the terms of the agree-

ment between the plaintiff and defendant for the payment of the undisputed portion of the loss, and the best evidence of which is the resolution itself.

Defendant objects to the introduction of Plaintiff's Pre-trial Exhibit No. 13 for the reason that it only serves to indicate the willingness of the plaintiff to exchange the nominal [82] sum of \$300 for \$16,000.

Defendant objects to the introduction in evidence of Plaintiff's Pre-trial Exhibit No. 11 on the ground that it refers to the basis for the payment of the undisputed portion of the loss, the best evidence of which is the resolution.

Defendant objects to the introduction of Plaintiff's Pre-trial Exhibit No. 7 on the ground that it is irrelevant.

Defendant objects to Plaintiff's Pre-trial Exhibit No. 5 on the ground that it is irrelevant.

Defendant objects to the introduction in evidence of Plaintiff's Pre-trial Exhibit No. 2 on the ground that it is irrelevant, and on the further ground that it refers to the terms and coverage under the policy, the best evidence of which is the policy itself. [83]

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, a Court Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that on the 25th day of May, A. D. 1948, I reported in shorthand certain proceedings occurring on the trial of the above-entitled matter, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that

the foregoing transcript, pages numbered 1 to 83, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 21st day of October, A. D. 1948.

/s/ IRA G. HOLCOMB,
Court Reporter.

[Endorsed]: Filed Oct. 23, 1948.

[Endorsed]: No. 12114. United States Court of Appeals for the Ninth Circuit. Michigan Millers Mutual Fire Insurance Company, a corporation, Appellant, vs. Grange Oil Company of Linn and Benton Counties, a cooperative corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed December 4, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

No. 12114

GRANGE OIL COMPANY OF LINN & BEN-
TON COUNTIES, a co-operative corporation,
Appellee,

vs.

MICHIGAN MILLERS MUTUAL FIRE IN-
SURANCE COMPANY, a Michigan corpora-
tion,
Appellant.

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY ON APPEAL

To the Clerk of the above entitled Court:

The appellant for its statement of points upon
which it will rely on appeal hereby adopts the
statement of points appearing in the certified tran-
script of record herein.

GRIFFITH, PECK,
PHILLIPS & NELSON,
/s/ JAMES K. BUELL,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed December 6, 1948. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeal and Cause.]

MOTION

Comes now appellant and moves the Court for an order dispensing with the necessity for reproducing in the printed record on appeal herein Plaintiff's Exhibit 1 and defendant's Exhibits 19, 20 and 22, and providing that such Exhibits will be considered in their original form without reproduction. This motion is based upon the affidavit of James K. Buell and the stipulation of appellant and appellee hereto attached.

Dated at Portland, Oregon, this 4th day of December, 1948.

GRIFFITH, PECK,

PHILLIPS & NELSON,

By /s/ JAMES K. BUELL,

Attorneys for Appellant.

(Acknowledgment of Service.)

AFFIDAVIT

I, James K. Buell, being first duly sworn, depose and say that I am one of attorneys for appellant in the above entitled cause; that plaintiff's Exhibit 1 is the policy of insurance which is the subject of the above cause and is material to this case; that said policy of insurance contains numerous riders and endorsements and assignments which are immaterial to the determination of this cause; that it is a provisional reporting type policy on a Standard Fire Insurance Policy Form to which has been attached a Standard Provisional Stock Form

endorsement for supplemental contract; that said Standard Provisional Stock Form endorsement has been designated and will appear in the printed record herein; and the policy is not in its entirety susceptible of reproduction in the printed record on appeal.

That defendant's Exhibits 19, 20 and 22 are reports of values made by appellee to appellant and are material to the cause; that the data contained in said reports has been tabulated and will appear in the printed record on appeal; and, that the reports in themselves on and in the form rendered are illustrative and are not susceptible to reproduction in the printed record on appeal herein.

/s/ JAMES K. BUELL.

Subscribed and sworn to before me this 4th day of December, 1948.

(Seal) /s/ RUTH H. OLSON,
Notary Public for Oregon.

My commission expires December 25, 1950.

STIPULATION

It is hereby stipulated by and between appellant and appellee through their respective attorneys of record that plaintiff's Exhibit 1, which is a policy of insurance and which is the subject of the above case, cannot be practicably reproduced in its entirety in the printed record on appeal, and that the Standard Provisional Stock Form endorsement of said policy can and will be reproduced in the

printed record, and that defendant's Exhibits 19, 20 and 22 are reports of values, the data of which can and will be incorporated in the printed record but which cannot be practicably reproduced in the printed record on appeal in its entirety. Application is, therefore, made for an order dispensing with the necessity of printing such Exhibits and providing that they may be considered in their original form without reproduction of them in their entirety in the printed record on appeal.

Dated at Portland, Oregon, this 4th day of December, 1948.

 GRIFFITH, PECK,
 PHILLIPS & NELSON,
By /s/ JAMES K. BUELL,
 Attorneys for Appellant.

 /s/ HUGH L. BIGGS,
Of Hart, Spencer, McCulloch & Rockwood and
Weatherford & Thompson, Attorneys for
Appellee.

So Ordered:

 /s/ WILLIAM DENMAN,
Chief Judge, U. S. Court of Appeals for the Ninth
Circuit.

[Endorsed]: Filed December 7, 1948. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL TO BE PRINTED

To the Clerk of the above entitled Court:

The record on appeal having been transmitted by the Clerk of the District Court to the Clerk of the United States Circuit Court of Appeals, the appellant hereby designates the following to be included in the printed transcript of record herein:

1. The entire certified transcript of record herein including reporter's transcript of testimony and original exhibits except

a. Such exhibits as the Court may order shall be considered in their original form without the necessity of reproducing in the printed record.

b. The following items pertaining to the removal of the above cause from the State Court: Circuit Court Summons, Notice of Removal, Undertaking for Removal, Petition for Removal, Affidavit of Mailing Petition, Undertaking and Notice, Order of Removal.

2. Statement of points upon which the appellant intends to rely on appeal in the Circuit Court of Appeals.

3. Designation of contents of record on appeal to be printed.

4. Order (if granted by the Court) dispensing with the necessity of printing exhibits.

GRIFFITH, PECK,
PHILLIPS & NELSON,
By /s/ JAMES K. BUELL,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed December 6, 1948. Paul P.
O'Brien, Clerk.